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THE MINERAL LEASING ACT OF 1960: ITS HISTORICAL DEVELOPMENT AND SOME CURRENT PROBLEMS

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THE MINERAL LEASING ACT OF 1920 ---- ITS HISTORICAL DEVELOPMENT AND SOME CURRENT PROBLEMS

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PART FOUR: THE FUTURE OF THE MINERAL LEASING ACT.

PART ONE: HISTORICAL DEVELOPMENT OF THE MINERAL LEASING ACT

I. SCOPE.

This paper will trace the historical development of the mineral laws of the United States as to the public domain [1] from the adoption of the Constitution of the United States to the enactment of the Mineral Leasing Act of 1920. Next, there will be considered the amendments of major nature respecting oil, gas, and oil shale which have been made to the Leasing Act.

II. MINERAL OWNERSHIP CONCEPT PREVALENT IN COLONIES AT THE TIME OF ADOPTION OF THE CONSTITUTION.

In general the laws of the United States have been derived from the common law of England that was extant at the time of the American Revolution.[2] Furthermore, it has been stated that "Sir William Blackstone's Commentaries on the Laws of England (1765-1769) was much used in America in the contests between the colonies and the crown which culminated in the Revolution, and was accepted by the courts after the Revolution as a statement of the law which we received."[3] Hence, the following statement from Blackstone's Commentaries, Book II, Ch. II, page 18 indicates the concept of mineral ownership which prevailed in the colonies:

> "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cujus est solum, ejus est usque ad coelum (whoever has the land possesses all the space upwards to an indefinite extent), is the maxim of the law; upwards, therefore,

> no man may erect any building, or the like to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it."

Although the original states disputed as to whether they or the National government should control the relatively unsettled western lands, they accepted the common law principle that the land surface owner also owned everything beneath his land.[4]

III. PRE-CONSTITUTION MINERAL POLICY.

The Articles of Confederation of 1777 established a "firm league of Friendship" wherein each State retained its "sovereignty, freedom and independence and every power, jurisdiction and right" not expressly delegated to the United States.[5] One essential ingredient withheld from the National government was the power of taxation. Because of this fact, the Congress of the Confederation looked to the unoccupied lands of the West as a means of raising money, and to further this purpose it passed a resolution on October 10, 1780, providing for the disposal, for the common benefit of the United States of the territories ceded to the United States, for the formation of States out of these Territories, and for the regulation by Congress of the granting and selling of these lands.[6]

The question of the treatment of western lands was a source of considerable controversy between the six States which had no claims and the seven States which had extensive claims to western lands.[7] Finally, the argument that the western land had been attained by common sacrifices, and, therefore, should be common property prevailed with New York making the first cession to the National government in 1781.[8]

The general pattern of disposal of these lands by the Federal government was established by the Land Ordinance of 1785 which provided for a system of surveying to provide for townships of 6 statute miles square, in each of which townships section 16 was reserved for schools and four sections (8, 11, 26, and 29) were reserved for future disposition. The remaining sections were offered for sale. The Federal government's only reservation was "one-third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of as Congress shall hereafter direct."[9] In making this reservation the Ordinance of 1785 followed the prevalent European practice employed in granting land to the Colonies.[10]

The initial Federal land policies enunciated in the Land Ordinance were probably dictated more by the exigencies of the time than by any underlying philosophical basis. There was an urgent need for revenue and a need for rapid settlement of the

western lands to establish firmly economic and political ties between these lands and the 13 States;[11] and an expeditious method of accomplishing these purposes was the underlying design of the Land Ordinance.

IV. CONSTITUTIONAL TREATMENT OF PUBLIC LANDS.

The Constitution was silent with respect to what public land policy should be followed but was explicit in granting powers to the Congress to handle such lands. Article IV, Section 3, provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .

The courts have repeatedly held that this provision gave exclusive and complete authority to the Congress to dispose of the public domain as it saw fit.[12]

V. MINERAL POLICY OF THE UNITED STATES BETWEEN CONSTITUTION AND 1866.

The reservation of "one-third part of all gold, silver, lead and copper mines" by the Federal government in the Land Ordinance of 1785 may be considered a leasing policy, which continued up to 1866. The policy in execution was somewhat desultory, for most of the minerals in the eastern part of the United States were disposed of under the agricultural land laws.[13] However, an underlying policy of separate treatment of minerals was indicated in this period by the reservation of all salt springs and licks, by the leasing of reserved saline lands, and by the collection of information on copper bearing lands.[14] In 1807 an act provided that lead mines discovered in the Indiana Territory could be leased by the President.[15] In 1816 a law provided for the reservation and leasing of lead mines and salt springs.[16] However, a leasing system was not exclusively followed and under legislation enacted in 1829, 1846, and 1847 certain mineral lands were offered for sale in fee.[17]

Dissatisfaction with the leasing system was expressed by President Polk in his first message to Congress on December 2, 1845 as follows:[18]

> The present system of managing the mineral lands of the United States is believed to be radically defective. More than a million acres of the public lands,

> supposed to contain lead and other minerals, have been reserved from sale, and numerous leases upon them have been granted to individuals upon a stipulated rent. The system of granting leases has proved to be not only unprofitable to the Government, but unsatisfactory to the citizens who have gone upon the lands, and must, if continued lay the foundation of much future difficulty between the government and the lessees .... I recommend the repeal of the present system and that these lands . . . be brought into market and sold upon such terms as Congress in their wisdom may prescribe, reserving to the government an equitable percentage of the gross amount of mineral product . . .

A radical change of policy resulted from the discovery of gold in California in 1848. The Federal mineral policy which has controlled the exploitation of metaliferous public lands to the present time, and was to control the early exploitation of oil and gas on the public domain, stems from this time. Mr. Justice Field described the events of this period in Jennison v. Kirk, 98 U.S. 453, 25 L.Ed. 240 (1878), a case involving California water rights:

> At pages 457 and 458: The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States and were unsurveyed, and not open, by law to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them

> that love of order and system of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention . . . . The first appropriator was everywhere held to have within certain well-defined limits, a better right than others to the claims taken up, and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. . . . These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years -- from 1849 to 1866 -- the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands.

Although Mr. Justice Field observes that the miners in California "carried with them that love of order and system of fair dealing which are the prominent characteristics of our people", the love of fair dealing only extended to their relationships with one another and had nothing to do with their trespass and appropriation of the wealth of the public domain which belonged to all the people. Colonel Mason, military governor in California at the time of the first gold discoveries, reported on this feature:[19]

> The entire gold district, with very few exceptions of grants made some years ago, by the Mexican authorities, is on land belonging to the United States. It was a matter of serious reflection with me how I could secure to the government certain rents or fees for the privilege of procuring this gold; but upon considering the large extent of country, the character of the people engaged, and the small scattered force at my command, I resolved not to interfere, but permit all to work freely.

Undoubtedly the Federal government acquiesced to these trespasses for several reasons, [20] and after doing so for 18 years (1849 to 1866) it was in a poor position to take a different stand. Congress in 1866 acknowledged the situation by passage of the Act of July 26, 1866, c. 262, 14 Stat. 251 which provided in part:

> That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . . subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Looking back a century it is difficult to understand how this great give-away was brought about. The United States might have had difficulties in restraining unlawful exploitation of the mineral deposits if it had reserved certain rights in them; however, the difficulties of protecting such rights is a poor basis for deciding to tatally relinquish all rights. It is understandable

that such a system is accepted in today's society,[21] since the taxing authority of the National and State governments allows control over the profits miners make on their discoveries. Through taxation the largesse of the national resources is generally distributed to the people. However, in 1866 this condition did not exist to the degree it does today.

There is little purpose in exploring today what motivated Congress to establish a policy of free exploitation of the natural resources. It is sufficient to note that such a policy was established. The break with tradition by this policy is noted in Buford v. Houtz, 133 U. S. 320, 331-332 (1890):

> As evidence of the liberality with which the government of the United States has treated the entire region of country acquired from Mexico by the Treaty of Guadalupe Hidalgo, it is only necessary to refer to the fact that while by the laws of Mexico every discoverer of a mine of the precious metals was compelled to pay a certain royalty to the government for the use of the mine in extracting its minerals, as soon as the country came under the control of the United States, an unlimited right of mining by every person who chose to enter upon and take the risks of the business was permitted without objection and without compensation to the government; and while this remained for many years as a right resting upon the tacit assent of the government, the principle has been since incorporated into the positive legislation of Congress and today the larger part of the valuable mines of the United States are held by individuals under the claim of discovery without patent or any other instrument from the government of the United States granting this right, and without tax or compensation paid to the government for the use of the precious metals.

Although the Act of 1866 established a general policy of free exploration and development of the public lands, it only provided for the issuance of a patent to mining claims based on vein or lode discoveries. Consequently, in 1870 the Congress passed a placer mining law which provided for patenting this type claim.[22] In 1872 Congress passed a general mining law which combined the provisions of the Acts of 1866 and 1872 into one set of legislation.[23] (NOTE: Appendix A gives a chronological list of the major legislative enactments which affect, or have affected, oil, gas, and oil shale development on the public domain together with a summary or excerpt of the salient contents of the legislation. Appendix B tabulates the amendments which have been made to the Mineral Leasing Act of 1920.).

VI. POLICY OF THE UNITED STATES TOWARDS PUBLIC OIL LANDS FROM 1866 TO 1920.

A. First Specific Petroleum Legislation.

Although commercial production of oil was first accomplished by Colonel Drake near Titusville, Pennsylvania in 1859, Congress had no occasion to consider this resource in connection with public lands until after the Act of 1866; the first commercial oil discovery in a public land state[24] was not made until 1875 in Pico Canyon, California.[25]

Although a Federal court held in 1894 that public land containing petroleum could be acquired under the mining laws applicable to placer claims,[26] the Secretary of the Interior ruled in 1896 that petroleum lands were not mineral lands and could not be entered under the mining laws.[27] This prompted Congress in 1897 to pass specific legislation applicable to public oil lands. The Act of February 11, 1897, 29 Stat. 526, provided:

> That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims. Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

B. <u>Public Oil Lands Withdrawn From Entry</u>.

Prolific discoveries in California made it the leading oil producing state from 1903 to 1906; and from 1907 to 1926 California and Oklahoma traded positions as the nation's leading producing states.[28]

The rapid exploitation of oil in California during this period made it the focal point in the formulation of a national policy for the public oil lands. A combination of fear of over-exploitation of the nation's oil wealth and the need for oil in the conversion of the American Navy from coal to oil lead the Director of the U. S. Geological Survey Geo Otis Smith to advise the Secretary of the Interior by letter of February 24 1908 as follows:[29]

> I have the honor to call your attention . . . to the superiority of liquid fuels --- that is, petroleum products in one or another form --- on steamships, and also to the policy of the British Government in using such liquid fuels as emergency fuels in battleships . . .
>
> It will be easy, if desired, to multiply the authoritative statements already in print concerning the superiority of liquid fuel for the navy. For that reason I have to recommend that the filing of claims to oil lands in the State of California be suspended in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive.
>
> * * * * *
>
> The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to continue ownership of oil lands there more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away.
>
> * * * * *

> Regarding the petroleum supply, the production last year did not meet the requirements of the trade, and the reserve stock was drawn on to meet the demand. At present the rate of increase in demand is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply.

As a result of this letter, the Secretary of the Interior on September 27, 1909 issued the first of several withdrawal orders which closed the public oil lands from entry. The withdrawals were stated to be "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain . . . ." At the time of the withdrawals it was generally believed that the Executive Department did not have the authority to withdraw public lands from entry without specific Congressional authorization;[30] and because of concern over the validity of such Executive action Congress passed the Pickett Act in 1910[31] which gave the President authority to withdraw public lands from entry for "public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress." Following the Pickett Act the President confirmed the orders withdrawing the public oil lands from entry.

As it turned out the passage of the Pickett Act was unnecessary for the Supreme Court in United States v. Midwest Oil Company, 236 U.S. 459 (1915), decided the President had the authority to make the withdrawals without specific Congressional authorization.

C. Deficiencies in development of public oil lands under placer mining laws.

From 1909 until 1920 the public domain was essentially closed to new oil and gas development. This condition was not allowed to persist without efforts to get legislation to establish a Federal policy for the public oil lands.[32] Congress, however, was unable to agree on a policy until 1920.

Congressional hearings during this decade indicated that the location of oil lands under the placer laws was not satisfactory. Under the placer mining laws an individual was entitled to locate on a 20 acre tract substantially rectangular in shape. Eight claimants could pool into one location with the right to proceed to patent once a discovery was made on the land located; hence, a 160 acre location was the largest unit considered for patent. There was no limit on the number of locations any particular person or association could make although the 20 acre limitation applied to any particular location.[33] The difficulties under this system were:

(a) The Federal government maintained no authority to regulate production practices. Consequently, the

rule of capture was allowed full sway without regard to safeguarding the natural resource.[34]

(b) Since discovery was an essential element of proceeding to patent, the initial locator might be beaten out by another who would first make the oil and gas discovery.[35]

(c) "Dummy locations" were prevalent, and the contesting of these locations by the Department of Justice had cast considerable doubt on the validity of many oil and gas operations. A "dummy location" was one made by an individual not in his own behalf, but for the benefit of some corporation or other individual.[36]

(d) Paper locations were made; that is, locations were staked out and notice filed locally (Federal filing was not required until an application for patent was made) without proceeding to discovery, primarily for speculative and nuisance purposes.[37]

VII. MINERAL LEASING ACT OF 1920.

A. Congressional Discussions.

Congress clearly recognized the shortcomings of using the placer mining laws to dispose of oil lands, but had difficulty in deciding upon another method. There were two major areas of disagreement.[38] Generally speaking Congressmen of the West wanted the discoverer to be given a patent to the land, and Congressmen of the East wanted the United States to retain title to the land and lease it for exploration and development. The same geographical grouping formed in connection with what should be done about claimants to the withdrawn land, that is, those who had some equitable position with respect to the land, but no legal basis for applying for a patent under the Petroleum Placer Act of 1897.

Congressman Thompson of Illinois was a leader in urging that the United States lease these lands. He argued that the public lands belonged to the United States and not to any particular state since the Federal government had bought the Louisiana purchase, and much other territory, with money from the general treasury.[39] Typical of the arguments against retention of the oil lands by the United States and a system of leasing is the following summary of the position of Representative Taylor of Colorado:

> . . . that it would result in the development of a huge bureaucracy which would absorb the royalties in expensive administration, would create a host of government

employees who could never be pried from their jobs; that tenants would never take as good care of the property as owners; that the leasing system involved a heavy loss of taxes to the state and counties of the West; that it deprived the western people of their freedom, compelling them to surrender the sovereign right of American citizens to local self government and become permanently helpless, if not servile, tenants under federal tyrants and autocratic predatory bureaucrats, . . . an outrage upon a free people.[40]

This type of rugged individualism denuded many of the forest lands of the country, cleared and cultivated lands until they were exhausted and then abandoned them, and produced oil and gas in a lamentably wasteful fashion.[41] Fortunately, the background of World War I requirements for oil and gas[42] and knowledge of the wasteful procedures used in production of oil and gas from the public lands[43] molded the thinking of Congress so that it was not swayed by such platitudes.

Related to the leasing or patenting argument was the question of how to dispose of the royalties if the land was leased. Legal acceptance of the principle that the minerals on the public domain belonged to the National government,[44] and not to the State where the mineral was located, should have pre-determined this issue; however, such was not the case. In opposing the payment of royalties into the Federal treasury Senator Thomas J. Walsh of Montana in 1916 said:[45]

There would be a perfectly valid objection to the exaction of a royalty which should go into the Federal Treasury for the general expenditures of the Government

> like the ordinary revenues. Tribute so paid would be nothing less than a tax levied upon a particular section of the country.

The reasoning was persuasive since the Act as passed earmarked only 10% of the royalties to the Federal Treasury. This was quite a departure from the position that had prompted 7 of the original 13 states to cede the unoccupied western lands to the National government since they were won by common blood and toil.

The problem of the relief to be given to claimants with varying equitable claims to the withdrawn oil lands was accentuated by a division between two departments of the government. The Department of Interior was in favor of a reasonably liberal provision, whereas the Department of the Navy was for a stricter provision.[46] The Navy was concerned since it was saddled with a number of claimants in the naval petroleum reserves which had been withdrawn in Wyoming and California.[47] This disagreement frustrated many of the legislative proposals during the period 1910 to 1920, when this question was being considered by Congress.

The significant dates in considering the various types of claimants involved are September 27, 1909, the first executive order withdrawing the public oil lands from entry, June 25, 1910, the date of passage of the Pickett Act by which Congress expressly granted to the President the authority to make such withdrawals, and July 2, 1910, the executive order entered after passage of the Pickett Act

which confirmed the 1909 public oil land withdrawals. It was not until 1915 that the Supreme Court in United States v. Midwest Oil Company[48] determined that the President, even in the absence of the Pickett Act, had acted within his constitutional powers when he entered the withdrawal order of September 27, 1909.

With this background the claimants on the withdrawn lands may be fitted into the following classes:[49]

(a) Those who were on the lands and made a discovery prior to the withdrawal order of September 27, 1909.

(b) Those who were on the lands in a proper and lawful manner, and had tried with due diligence to find oil, but had not yet made a discovery at the time of the withdrawal order of September 27, 1909.

(c) Those who had filed on the lands properly before the withdrawal of September 27, 1909, but had not pursued the work with due diligence, and had not made a discovery.

(d) Those who had gone on to the lands prior to the withdrawal of September 27, 1909, but had not been at the time of the withdrawal in diligent prosecution of a discovery, but after the withdrawal had proceeded to drill and discover.

(e) Those who assumed the withdrawal order of September 27, 1909 was invalid and had entered the withdrawn lands after this withdrawal, but before the confirmatory executive withdrawal of July 2, 1910.

(f) Those who had entered the withdrawn lands after the passage of the Pickett Act of 1910 and subsequent to the confirmatory executive withdrawal order of July 2, 1910.

The provisions of the Mineral Leasing Act of 1920[50] which resolved the treatment of these claimants are complex.[51] However, in general anyone who entered the withdrawn lands prior to the confirmatory executive order of July 2, 1910 and proceeded to make a discovery was given the right to surrender all claims based upon such entry and discovery in return for a 20 year lease to such lands at a royalty of not less than 12½%; provided, that if such entry and discovery was made on a naval petroleum reserve the lease was granted only to the producing well or wells. If entry was made on such lands prior to the withdrawal order of September 27, 1909, and no discovery had been made, the claimant was entitled to a prospecting permit under the general terms of the Act, provided that no such permit would issue if the naval petroleum reserves were involved.

B. <u>Salient Features of the Act Insofar as Oil, Gas, and Oil Shale Deposits are Concerned</u>.

The Mineral Leasing Act of 1920 represented a compromise on the basic issues outlined above. The United States retained title to the land subject to a system of leasing for exploitation; however, most of the royalty proceeds went to the states of mineral location. The treatment of claimants on the withdrawn lands followed the liberal pattern advocated by the Department of Interior except that claimants of naval petroleum reserve lands were strictly treated.

The Act* offered the oil and gas prospector an exclusive 2 year prospecting permit covering 2,560 acres of unproved land. The prospector had to begin drilling operations within six months, and to drill wells to an aggregate depth of 2,000 feet within two years, unless he sooner found oil or gas.[52] On discovery of oil or gas, the prospector was entitled to a 20 year lease of one-fourth of the land, or to 160 acres if the permit covered that much land, at a royalty of 5%, and a rental of $1.00 per acre;[53] he was also given a preferential right to lease the remainder of the land in his prospecting permit, at a royalty of not less than 12½% to be determined by the Secretary of the Interior.[54]

*NOTE: See Appendix A for detailed summary of the Act.

As to known geologic structures of a producing oil or gas field, the Secretary of the Interior was permitted to lease tracts no larger than 640 acres to the highest bidder at a royalty of not less than 12½%, and at a rental of not less than $1.00 per acre. These were 20 year leases with a preferential renewal right for an additional 10 years on terms set by the Secretary of the Interior.[55]

The Act recognized the need for conservation measures, and to this end prohibited the drilling of a well within 200 feet of the exterior boundary of the permitted or leased area, except under certain prescribed circumstances,[56] provided for the Secretary of the Interior to grant royalty relief when production from a well fell below 10 barrels per day,[57] and provided that each lease should be subject to the condition that all reasonable precautions would be taken to prevent waste of oil or gas.[58]

Concern was shown for preventing monopolies based upon development of public oil and gas lands; the Act provided that a maximum of three oil or gas leases could be held by a person, association, or corporation in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field.[59]

The passage of the Mineral Leasing Act set off a rush to lay claim to the public lands not unlike the Oklahoma land rush.[60] However, the Act gave authority to the Secretary of the Interior to prevent the wasteful practices which had been employed in the past, and was a major piece of conservation legislation.

VIII AMENDMENTS TO MINERAL LEASING ACT BETWEEN 1920 AND 1960.

A. Unitization Legislation of 1931.

Production of oil and gas without physical or economic waste is difficult to achieve under an unfettered "rule of capture"; this rule has been stated as follows:[61]

> The owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.

The practical results of this legal rule were described in 1924:[62]

> The discovery of an oil pool means that every landowner or lessee can take as much oil from this common pool as he can get, and there is always a frenzied scramble to bring oil to the surface regardless of whether the market needs it or not.
>
> Under present conditions oil must be consumed practically as fast as it is found whether it is needed or not. Therefore the exhausting of our oil resources is not based on our market needs for oil but on the rapidity with which our remaining reserves can be uncovered.

During the period 1924 to 1935 a concerted effort to ameliorate the effects of this rule was made by the Federal and State governments, and by industry.[63] As a result of these efforts two successful regulatory mechanisms evolved, proration and unitization. Oklahoma enacted the first market demand, or proration, statute in 1915, and the first statewide proration order under this statute was entered in 1928.[64] Proration was a step in the right direction but it had limited effectiveness from 1926 to 1935 when the glut of

oil on the market was aggravated by major discoveries at the Seminole field in Oklahoma, the Panhandle of West Texas, Kettleman Hills, California, Oklahoma City, and East Texas.[65] The primary drawback was the reluctance of a State to enforce restrictions on its own production absent assurance by other States that the reduction would not be offset by increased production elsewhere.[66] The overall effectiveness of proration legislation was not assured until six States agreed to the Interstate Compact to Conserve Oil and Gas in 1935.[67] Even though the Compact does not commit the member States to set a certain production quota for each State, the community of interest in not overproducing has resulted in a relatively stabilized market condition.

Proration statutes effectively prevent waste which results from crude oil production in excess of reasonable market demands, but do not touch upon an important facet of the conservation problem, namely, "The natural unit in oil deposits is the single pool, large or small . . ." and although "Man may draw property lines on the surface, making a checkerboard for title searchers and lease lawyers to play on . . . nature has fixed a boundary line around the underground deposit for geologists to discover and engineers to use in the development of the hidden resources."[68]

As early as 1916 the United States Bureau of Mines had recognized that the drilling for and production of oil and gas should be effected on the basis of the geologic structure containing the deposits, rather than on the basis of surface ownership.[69] However, any cooperative development of a geologic structure was prohibited on public lands by the anti-trust provision of the Mineral Leasing Act of 1920.[70] In 1924 President Coolidge created the Federal Oil Conservation Board composed of the Secretaries of War, Navy, Interior and Commerce for the purpose of obtaining a "full discussion of ways and means of safeguarding the national security of our oil", and noted at the time that "the present methods of capturing our oil deposits is (sic) wasteful to an alarming degree."[71] On March 12, 1929, President Hoover closed the Government oil lands from further leasing or disposal, and they remained closed until April 1, 1932[72] so that "the public domain [would] not contribute to the conditions of over-drilling and potential overproduction which the oil-producing states have been endeavoring to correct . . ."[73] The Federal Oil Conservation Board in its first report (1926) recognized the need for "cooperative action for the sane and orderly development of new fields by means of voluntary agreements among operators of a pool to restrict its development and operation."[74]

Secretary of the Interior Wilbur had an early opportunity to develop such a cooperative plan. The discovery of the Kettleman Hills Field in California, which was checkerboarded with public and private lands, set off a competitive drilling program which resulted in an enormous waste of gas.[75] The Secretary negotiated a shut-in agreement for the field in 1929, in 1930 Congress enacted temporary legislation authorizing the United States to approve a cooperative plan of development for the field,[76] and on January 31, 1931 such a plan was approved. The success of the plan in reducing production and eliminating waste in the field[77] resulted in permanent legislation, Act of March 4, 1931,[78] amending the Mineral Leasing Act. The amendment permitted Federal lessees or permittees to enter into unit agreements whenever the Secretary of the Interior determined it to be advisable in the public interest.[79]

When the public lands were again opened for oil and gas exploration and leasing in 1932, the Department of the Interior instituted a policy of issuing prospecting permits subject to the agreement of the permittee that "prior to the expiration date of the permit a cooperative development plan for the entire structure [would] be submitted, and that when and if production [was] obtained, the area [would] be produced under a unit plan of operation which under the direction of the permittees, themselves, and under the general supervision of the Secretary of the

Interior, [would] insure a ratable share of production to all of them on the same structure, and, at the same time, insure against over-production and consequent waste."[80] The principle of compulsory unitization authority in the Interior Department was confirmed by Congress in the 1935 amendments to the Mineral Leasing Act,[81] and has been continued in the Act.[82]

Since little development of the public lands occurred in the 1930's, these stringent unitization requirements did not play a direct role in overcoming overproduction, and wasteful production practices of this period. However, the indirect effect was sizeable since they set a pattern and to a considerable degree alleviated industry concern that unit agreements would contravene the Federal anti-trust laws.

B. <u>1935 Amendments.</u>

The 1920 Act was framed at a time when "there appeared to be serious danger of a speedy exhaustion of the domestic supply of oil and gas,"[83] and the decade immediately preceding the 1935 amendments saw "the discovery of one large oil field after another turn apparent scarcity into actual overabundance".[84] Because of these factors the unusual device of a short term prospecting permit with mandatory drilling requirements, and the unprecedented 5% royalty on new discoveries were out of date. In addition the Interior Department was critical of the 5% royalty because:[85]

The reward for successful prospecting, the difference between the special royalty of 5 per cent and the customary royalty of 12.5%, 16 2/3%, or more, in practice has not gone to an operator who expended money in search of oil on the permit area but, in general, to a promotor, lease broker, or speculator who sold his prospecting rights to the real operator, reserving to himself the 'reward for discovery' and oftentimes a cash bonus in addition. This royalty and bonus, rightful property of the United States as owner of the mineral deposits, has been granted by the terms of the experimental legislation of 1920 to those who have done little or nothing toward development.

For these reasons Congress materially changed the system of disposing of the public domain oil and gas resources by providing for the issuance of leases calling for not less than a 12.5% royalty, instead of prospecting permits for unproven lands.[86] The leases did not have any specific drilling requirements.

Another criticism of the 1920 Act was the 20 year lease with the right to renewal for 10 year periods on such terms and conditions as the Interior Department may impose. In this connection Interior observed:[87]

> There being no assurance of tenure or terms beyond the first 20 year period lessees attempt to produce all oil and gas within that period . . . . In view of the existing overproduction of crude oil . . . it seems only reasonable that the term of the lease should be for the productive life of the wells thereon, thus avoiding the necessity of producing all oil possible within a prescribed term regardless of conditions in the industry.

Congress adopted this policy and provided for 5 year leases on unproven lands, and 10 year leases on proven lands, each of which

continued as long thereafter as oil or gas was produced in paying quantities.[88]

The Interior Department also took a strong position on the non-competitive procedure of granting rights to unproven lands. The Department determined that such procedure was subversive to the public interest, since:[89]

> In particular it offers an invitation and encouragement to him who in public land parlance is called a "sooner". Such an individual, for example, seeing a geological party at work, may take advantage of his knowledge of their presence and hurriedly file application and substantially without expense or effort obtain a preference right, to the disadvantage of persons who are in good faith making expensive preliminary investigations.

Congress did not agree to elimination of the "sooner" from the public land scene, and continued the policy of giving the first applicant the right to lease unproven lands.[90] This policy has continued through 1962,[91] but the inequity of such individuals profiting from those who desire to spend money developing the public lands is controlled by a 5% limitation on the overriding royalties which can be held on public land leases.[92]

The amendments included two provisions which have continued through 1962: (1) the right of the Secretary of the Interior to compel a lessee to unitize his lease,[93] and (2) the exclusion of unitized acreage from computation under the acreage limitations imposed upon individual, association or corporate lease holdings.[94]

In addition to these statutory conservation measures, the Secretary of the Interior under his statutory authorization[95] "to prescribe necessary and proper rules and regulations . . . to carry out and accomplish the purposes of this Act" has retained almost absolute power to control the operations of lessees. This is done by the insertion of the following provision in leases issued under the Act:[96]

> It is convenanted . . . that the rate of prospecting and developing and the quantity and rate of production from the lands . . . shall be subject to the control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder . . .

This provision is contained in the 1960 public land lease.[97] Although this provision has not been judicially tested, it is well founded since Congress can dispose of property of the United States under any conditions it deems appropriate.

C. <u>1946 Amendments</u>.

A radical change in the domestic oil supply occurred between 1935 and 1946. The Senate Report[98] on the proposed amendments characterized the change as follows:[99]

> The bill is the first general revision of the Mineral Leasing Act since the act of August 21, 1935. At that time the Nation had an abundance of Petroleum. The center of gravity, so far as the production of oil is concerned, was then in the Western Hemisphere, today it is being shifted to the Eastern Hemisphere. Although in the past 85 years 63.8 per cent of all world petroleum came from the United States, today the Nation possesses

> but 32 per cent of the estimated crude oil reserve of the world. World War No. II has demonstrated beyond peradventure of doubt that the salvation of this Nation demands that we develop our petroleum reserves to the utmost, to the end that this Nation shall not risk loss of either industrial or political leadership.

The great drain placed on our crude oil reserves by World War II, and the difficulties of carrying on oil and gas exploration as a result of personnel and material shortages during the war, prompted Congress to pass several measures immediately prior to and during the war. In 1940[100] the payment of lease rentals for the second and third lease years was waived, in 1942[101] the holders of 5 year non-competitive leases were given a preferential right to renew such leases for another 5 years if the leased lands were not within a known geologic structure of a producing oil or gas field at time of lease expiration, and in 1942[102] lessees discovering new oil or gas fields were permitted to pay a flat 12.5% royalty on production for 10 years following the date of discovery.

In 1946 Congress took steps to encourage more exploration and development of the public lands;[103] it provided for a flat 12.5% royalty on non-competitive leases,[104] shortened the term of competitive leases from 10 to 5 years, and only required competitive leases of lands "within any known geological structure of a producing oil or gas field" in lieu of such requirement for lands "which are known or believed to contain oil or gas deposits". Somewhat

anomalously Congress continued and enacted provisions allowing speculators to tie up large portions of the public lands without much capital outlay; specifically, it continued the waiver of 2d and 3rd year lease rentals and the preferential right of non-competitive leaseholders to renew for 5 more years, and enlarged the acreage limitations.

Pressure applied by public land lease brokers must be given partial credit for this situation. However, Congress rationalized the anomaly by concluding that large holdings of public lands by single individuals, associations, or corporations would lead to faster development of the lands. For example, one ratiocination was that "The enlargement of the acreage limitation is well justified . . . and is necessary to permit further development of the public domain by many operators who presently hold the maximum acreage allowable, much of which is substantially depleted by many years of continuous production". The departure in acreage limitations was major. Under the 1935 Act individuals, associations, and corporations were limited to leases of 7,680 acres within any one State and 2,560 acres within a single geologic structure of a producing oil or gas field. Under the 1946 Act leases of 15,360 acres were permitted in any State, the limitation of holdings within a single geologic structure was eliminated, and interests held under option to purchase or otherwise acquire leases

when "taken for the purpose of geophysical exploration" were not to count against the acreage limitations. However, a limit of options to 100,000 acres in any one State was enacted. The Department of the Interior favored these relaxations in the following language:[105]

> The option provision legalizes . . . a method that has been commonly employed by industry in the past several years to assemble sufficient acreage to warrant extensive geophysical work . . . The cost of exploratory work to find new oil deposits has increased appreciably in recent years due to deeper drilling and the difficulties involved in locating prospective oil pools in areas where the subsurface geologic features cannot be interpreted from formations exposed at the surface. If prospecting of the public domain is to be encouraged some such procedure is essential.
>
> * * * * *
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> In 1920 . . . there were relatively few producing oil or gas structures in the public land States. The market for oil and gas from these structures was confined to a small area and under these conditions the ownership or control by one person of all or most of any one structure could have resulted in a local monopoly.

Although Interior appeared to favor the option system, it really was acting defensively. Its historic administrative position was that option arrangements should not count against acreage limitations.[106] By urging Congress to recognize the fait accompli it was able to bring some limitation to this type operation. Congress approved the holding of 2 year options and required semi-annual statements from option holders indicating their total holdings.

D. 1947 Mineral Leasing Act for Acquired Lands.

This Act[107] does not strictly pertain to the Mineral Leasing Act of 1920, but does provide the means by which considerable lands of the United States are leased for oil and gas development; this is done by providing for leasing under "the same conditions as contained in the leasing provisions of the mineral leasing laws."[108] The genesis of the Act was the report of a Special Senate Committee which conducted an "Investigation of Petroleum Resources in Relation to the National Welfare" from 1944 through 1946.[109] This committee heard testimony as to the ingenuity and capabilities of the oil industry to maintain adequate crude oil reserves.[110] However, the committee took a conservative course in the following statement:[111]

> However sanguine may be the hopes of geologists derived from historical trends of discovery, or however likely may be the presence of petroleum in untested areas, it would be unwise to rest conclusions for present purposes upon any premise other than "proved" reserves as that adjective is understood by the American oil industry. If present estimates of future productive possibilities are later demonstrated to have been conservative, our national oil policy could be readily adapted to the happy plenitude of supply. If the future proves less roseate, our policy will have run concurrently with the facts and the nation's security will not have been adventured.

The committee estimated in its final report that there were 150,000,000 acres of Federal lands acquired by condemnation, deed, etc., which were not part of the public domain, and consequently

not subject to leasing under the mineral leasing laws;[112] the committee urged the Senate to give consideration to the mineral deposits in these lands. The Act of August 7, 1947 did this. The only major deviation from the Mineral Leasing Act of 1920, as amended, was the provision that "All receipts derived from leases issued under the authority of this Act shall be paid into the same funds or accounts in the Treasury and shall be distributed in the same manner as prescribed for other receipts from the lands affected by the lease".[113] Therefore, revenues were generally earmarked for the Federal and not the State treasuries.

E. Amendments to Mineral Leasing Act from 1946 to 1960.

1. Prior to General Revision of 1960.

Technical changes were made in the Act in 1954,[114] but no substantial changes in principles or scope of the Act were made until 1960. The major change from 1946 to 1960 was relaxation of the acreage limitations. Presumably the relaxation was brought about by the sharply increasing costs of finding oil and gas deposits,[115] and the relative economic advantage of having a large block of lands upon which to conduct exploration. In 1954 the acreage limitation in any one State was increased to 46,080 acres, and permissible option holdings to 200,000 acres in any one State.[116]

2. 1960 Revision Act.

The Act of September 2, 1960[117] undertook to bring the

Mineral Leasing Act up to date in language, principle, and scope. After extensive hearings[118] Congress was substantially satisfied with the present form of the Act. In general, it reenacted the requirements for competitive leasing in blocks of not more than 640 acres of lands within known geological structures of producing oil or gas fields, at a royalty of not less than 12.5%, and the noncompetitive, first applicant, leasing of other lands at a flat 12.5% royalty. A five year term for competitive leases was continued, but non-competitive leases are now issued for 10 year terms; each type lease continues so long as oil or gas is produced in paying quantities. The distinction between acreage held under lease, and that held under option is abolished with an overall limitation of 246,080 acres in any one State regardless of how held. The annual rental per acre was raised to 50 cents, and the waiver of 2d and 3rd year rentals was abolished.

Congress determined that the situation in the United States was such that it was desirable to make continued exploration of the public lands attractive. The Senate Report on the bill enacted stated:[119]

> . . . in the past several years there has been a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace. The decline in exploration is caused in large part by the falling off of domestic production --- from 7,150,000 barrels daily a year ago to 6,850,000 barrels daily in May of this year [1960] --- as a result of global factors embracing the fabulously flush production of Middle

> East oil fields and increase in Venezuelan and, most recently, North African production. At the same time that our domestic production has been declining by some 3 per cent, our consumption has been rising by about 5 per cent to some 9 million barrels daily.
>
> This falling off of domestic exploration is readily discernible in the figures of the Interstate Oil Compact Commission covering active exploration crews. In April, 1960 the number of such crews was 419, in contrast to 490 at the end of 1959 and 725 in the peak year of 1953.

The continuation of the relatively liberal terms under which the public oil and gas lands may be exploited is consistent with these observations.

The only major change in the Revision Act was in scope. The Mineral Leasing Act was extended to cover "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)".[120] In speaking of this extension the Senate Report said:[121]

> New technology has brought the hydrocarbons now locked in the interstices of the so-called tar or oil sands to the edge of commercial production. This section . . . will make it possible for entrepreneurs to secure an oil sands lease, generally along the terms already set out in the law for oil shale leases.
>
> * * * * *
>
> The avoidance of expensive crushing and the lack of extensive overburden give petroleum sands a commercial advantage over the oil shale, its proponents assert. When exposed at the surface, the oil sands present the possibility of economical open-pit mining. Known deposits exist in Colorado, New Mexico, Utah, Texas, California, and Missouri.

Underground mining opens the possibility that the oil sands of old and exhausted fields may also be exploited. By authorizing the issuance of oil sands leases under the multiple-use principle, the section provides the legislative means by which sands of exhausted fields may be mined for the extraction of oil.

IX. OVERALL OBSERVATIONS REGARDING DEVELOPMENT OF PUBLIC OIL, GAS, AND OIL SHALE DEPOSITS.

A. Principles of the Mineral Leasing Act of 1920.

The general principles of the Mineral Leasing Act of 1920 have been very closely followed to the present time. However, national needs with respect to oil and gas have been reflected by emphasis or deemphasis of these principles. The principles legislated in 1920 were:

(a) The lands of the National Government should be open for development of oil, gas, and oil shale deposits by private interests under a leasing system under which title to the lands is retained by the National Government.

(b) The Executive Department of the National Government should retain control over the manner in which these resources are developed.

(c) The benefits resulting from the development of the oil, gas, and oil shale resources should be distributed as widely as possible, and the concentration of wealth by virtue of such benefits should be controlled.

(d) The remuneration flowing to the Government from the development of these resources should be channeled to the States in which the resources are located.

Various facets in the implementation of these principles are discussed hereafter.

B. Lands Available for Oil, Gas, and Oil Shale Development from 1920 to 1962.

The demand for petroleum products has grown steadily from 1920 to 1962. The reliance of our national economy and defense on petroleum products has grown throughout this period. For example, in 1920 the production of crude oil in this country was 442,929 thousand barrels, and this crude oil supplied 13.9% of the mineral fuels energy consumed in this country.[122] In 1955 the production of crude oil in this country was 2,484,428 thousand barrels, and this crude oil supplied 42.7% of the mineral fuels energy consumed in this country.[123] The per capita consumption of crude oil per year went from 4.27 barrels in 1920 to 16.96 barrels in 1955.[124] The availability of productive capacity has been the key to congressional action during this period.

From 1920 to 1962 the petroleum supply picture of the United States has gone full cycle. In 1920 we were a nation with a perilously short supply, in the late 1920's and 1930's we had an unmanageable oversupply, and since the start of World War II we have again been fearful of our short supply. Congress and the Executive Department have reacted to these stimuli by closing the

public domain to oil and gas leasing during the period of unmanageable supply, and by thereafter making available more and more public lands for development.

The 1947 Mineral Leasing Act for Acquired Lands made available millions of acres which the United States had acquired since 1920, and also applies to lands acquired after 1947. These lands were not subject to lease under the Mineral Leasing Act of 1920 which only applied to the public domain.[125] Both Acts exclude from their coverage lands situated within "incorporated cities, towns and villages, and national parks or monuments."[126] The Acquired Lands Act also excludes acquired lands "set apart for military or naval purposes."[127]

Although the Mineral Leasing Act initially excluded military lands, the 1946 amendments to the Act eliminated this exclusion.[128] Hence, the authority to lease military lands is available if such lands have as their source of origin the public domain, but not if they have been acquired by the United States.[129] This statutory restriction placed the Executive Department in an untenable position in 1941 when oil was being drained from beneath land acquired by the War Department. However, the Attorney General gave the practical solution to fill the void in the law by determining that the Executive Department could protect such lands from drainage by leasing even

in the absence of express Congressional authorization.[130] This authority extends to all lands of the United States which are not otherwise available for mineral leasing.

The Outer Continental Shelf Lands Act of 1953,[131] and its companion Act, the Submerged Lands Act of 1953,[132] were the political solution of an impasse which had developed between the States and the United States with respect to offshore lands.[133] In essence these Acts deeded to the States all lands within 3 miles, or within 3 marine leagues in certain instances of their coast lines, asserted United States sovereignty over lands seaward of the State lands, and made available the lands of the United States for leasing. It is noteworthy that the deeding of the coastal lands to the States was a major deviation from the principle of the Mineral Leasing Act that Federal oil and gas lands should be retained by the National Government. However, the factors leading to this deviation were so diverse and peculiar to these particular lands that it can hardly be viewed as a change of policy. On the other hand, the assertion of sovereignty beyond the 3 mile limit of the Federal coast line was a policy decision which will have great significance as the years progress.[134]

The Multiple Mineral Development Act of 1954[135] was a great boon to the development of the public lands. The purpose of the Act was set out in the Senate Report on the bill in the following

manner:[136]

> The intent of the bill . . . is to resolve conflicts between the mining laws of the United States and the Mineral Leasing Act which have prevented mineral development of the same tracts of public lands from going forward under both systems. Land on which mineral locations have been made under the mining laws has not been open to leasing under the Mineral Leasing Act, and on the other hand land covered by an oil and gas lease or permit, or an application or offer for the same, under the Mineral Leasing Act, or known to be valuable for oil and gas or other Leasing Act minerals, could not be located under the mining laws.
>
> . . . An immediate effect would be the opening of some 60 million acres of the public lands, now under oil and gas lease, to location for uranium and other minerals. At the same time, it would stimulate oil and gas development on the public lands by authorizing operations for leasable minerals on lands open to location under the mining laws, and by establishing a means for determining the validity of any rights claimed for Leasing Act minerals under patented mining claims located prior to the effective date of this act.

Existing statutory authority makes virtually all lands of the United States available for oil, gas, and oil shale development. Congressional action is needed with respect to oil shale lands, development of which is being hampered by both economic considerations and legal snarls resulting from ancient mining claims. This need is discussed in detail in Part Three of this paper.

C. <u>Administration of Oil, Gas, and Oil Shale Leases of Public Lands</u>.

Congress has given very broad supervisory authority to the Secretary of the Interior with respect to oil, gas, and oil shale

leases through the delegation of rule making authority.[137] The rules and regulations that the Secretary makes are the equivalent of statutory enactments, so long as they do not conflict with existing statutes.[138] The Secretary cannot disregard his own rules,[139] which are quite paternalistic and under which the activities of the lessees are closely supervised.[140]

The ultimate sanction which a lessor can employ is cancellation of a lease. With respect to such action by the Secretary of the Interior there is a difference of opinion between the Courts of Appeals for the District of Columbia and the 10th Circuit. Each of these courts have considered the authority of the Secretary to cancel a lease when the Secretary subsequently determines that the lessee obtained the lease in violation of the Secretary's regulations or the terms of the Mineral Leasing Act.

The 10th Circuit Court of Appeals decided Pan American Petroleum Corporation v. Pierson[141] in 1960; an injunction was sought by Pan American, an assignee of the original lessee, against the local representatives of the Bureau of Land Management who had instituted proceedings to cancel both producing and non-producing leases because of fraud in the initial procurement of the leases -- holdings in excess of the acreage limitations specified in the Leasing Act. The court said:[142]

> /The Secretary of the Interior/ as "guardian of the people of the United States over the public lands" /has

the/ obligation to see that neither patents nor leases are procured by fraud. The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provision giving him power to annul leases under the Mineral Leasing Act, that power is reserved to the courts.

On this basis the court concluded the Secretary had no power of cancellation on the facts presented, and that cancellation should be sought by judicial action.

The Mineral Leasing Act has only one provision allowing the Secretary to cancel leases; 30 USC 188 (1958) provides:

> Except as otherwise herein provided, any lease issued under the /Mineral Leasing Act/ may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions /of the lease, or of the general regulations promulgated under the Mineral Leasing Act in force at the date of the lease/ . . .
>
> Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to <u>cancellation by the Secretary of the Interior</u> after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . . (Emphasis supplied)

The Pan American case would suggest that the Secretary could only cancel a lease under the circumstances set out in the latter part of section 188, supra.

The Pan American case must be compared with two cases decided by the Court of Appeals for the District of Columbia. In 1955

McKay v. Wahlemaier[143] was decided by this court; a corporation, and the president and vice-president of the corporation, each filed separate applications for an oil and gas lease which was to be issued to the winner of a drawing from lease applications. The corporation president's application was drawn first and one Wahlenmaier's application was drawn second. After the issuance of the lease to the corporation president, Wahlenmaier complained to the Secretary that the corporation president had violated the Secretary's regulations by not disclosing his interest in the corporation in connection with his lease application, and asked that the lease be canceled and one issued to him. The Secretary determined that there had been a violation of his regulations but refused to cancel the lease. Wahlenmaier took his complaint to the Federal District Court which granted the relief he had asked of the Secretary; the Secretary appealed and the Court of Appeals affirmed the lower court judgment. The court stated the Secretary was bound by his own regulations and that he was "plainly wrong in refusing to cancel the lease . . ."[144] The court also said:[145]

> The Secretary's decision was probably based on confusion as to the nature of the question before him, and misapprehension of his own power and duty to cancel a lease obtained as this one was. If it was not so based, the decision is a shocking example of arbitrary administrative action.

In 1961 the District of Columbia Court of Appeals followed this decision in the case of Boesche v. Udall.[146]

These court decisions do not clearly establish what either Court of Appeals will do in any specific case. The 10th Circuit court seems to apply a clearly defined rule of law, namely, once the lease is issued only judicial action can be invoked to cancel it unless the Leasing Act otherwise provides, but it restricted its decision in acting on a petition for rehearing by the United States; the court there stated:[147]

> This case involves the administrative cancellation of an oil and gas lease for fraud by lessees in procurement. The comments of counsel relating to the authority of the Secretary to cancel for administrative errors or for breaches of lease provisions are beside the point and merit no consideration. We adhere to our view that the Secretary and the defendant officials are without authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance.

Accordingly, the Pan American case cannot be considered a precedent except when fraud by the lessee prior to lease issuance is invoked. It probably should be given little weight unless the fraud is in connection with acreage holdings. Section 27 of the Mineral Leasing Act, as amended, (30 USC 184 (1958)) provides, among other things, that if any person holds any interest in any lease in violation of the provisions relating to maximum holdings he may be compelled to dispose of such holding in an appropriate proceedings instituted by the Attorney General in the United States district court for the district in which the leased property is located. This statutory provision undermines the argument that Congress gave the Secretary

of the Interior authority to administratively cancel under these circumstances by Rev. Stat. 441, 5 USC 485 (1958), which establishes general supervisory authority in the Secretary over public lands. But conversely, 30 USC 184 gives foundation to the argument that Congress specifically provided for the acreage limitation situation because it recognized the general administrative authority of the Secretary to cancel leases in other similar circumstances.

The precedent value of the District of Columbia cases is limited to factual situations similar to those before the court. The argument of the United States for cancellation authority is succinctly stated in its brief on the Boesche case, supra, as follows:[148]

> Reliance upon the fact that the Mineral Leasing Act of 1920 does not expressly provide for the type of administrative cancellation envisaged here ignores more than 100 years of history. Neither was there authority more express than 5 U.S.C. sec. 485 in such administrative adjudications and cancellations as are found in Cameron v. United States, 252 U.S. 450 (1920); Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); Hawley v. Diller, 178 U.S. 476 (1900); Orchard v. Alexander, 157 U.S. 372 (1895); Knight v. U.S. Land Association, 142 U.S. 161 (1891); and Harkness & Wife v. Underhill, 1 Black 316 (1861). The authority of the Secretary under 5 U.S.C. sec. 485 enabled him to cancel a mining claim in the Cameron case; to cancel the lieu land selection in Riverside Oil Co.; to cancel an entry under the Timber and Stone Act, 20 Stat. 89, in the Hawley case; to cancel a homestead entry in Orchard v. Alexander; to cancel a survey and approve a later survey which resulted in the change of the ownership of certain properties in Knight v. U.S. Land Association; and to cancel a homestead entry in the Harkness case. The Secretary is authorized to

> act on the same general supervisory authority in the instant case. A specific grant is no more essential under the Mineral Leasing Act of 1920 than it was under the statutes involved in the cited cases.

Comparing this argument with 30 USC 188, supra, it would appear that Congress has made specific provision for administrative cancellation of validly issued leases when there is a subsequent violation of the lease or the regulations applicable to it, unless the lease covers lands known to contain valuable deposits of oil or gas and was issued after August 21, 1935. Therefore, the argument of the United States in the Boesche case would only apply to matters surrounding the issuance of the lease. Of course, it was only as to such matters that the court decided the Wahlenmaier and Boesche cases; hence, these cases are only precedent for the cancellation authority with respect to matters surrounding lease issuance.

The District of Columbia court might ultimately concur with the result in the Pan American case. It might find in the language of the Mineral Leasing Act, specifically in 30 USC 184, a congressional desire for judicial action in factual situations such as Pan American; however, the District of Columbia court has clearly rejected the patent analogy relied on in the Pan American case.

The United States pointed out in its Boesche brief that there is a practical need for the cancellation power in the Secretary; in the three year period prior to June 30, 1960, Interior issued

51,000 oil and gas leases and administratively canceled 1,129 of these. The cancellations were based on such reasons as: (1) issuance to other than the first qualified applicant, (2) issuance for land in a prior oil and gas lease, (3) issuance where the offer to lease was withdrawn before the lease was issued, and (4) issuance of a noncompetitive lease for lands on a known geologic structure. Surely the smooth administration of the public lands require the cancellation authority in the Secretary in such cases as the above. However, cogent arguments can be made against giving such authority when the lessee has expended monies on the development of the lease. The extent of this authority can be defined either by further judicial decision or by Congressional action; the latter is preferable. Congress did act in 1959 to place one limitation on the cancellation authority. The Act of September 21, 1959[149] protects bona fide purchasers, even though the rights of the original lessee are subject to cancellation for violation of the acreage limitation provisions of the Leasing Act.

D. Distribution of Benefits from Public Oil, Gas, and Oil Shale Lands.

In the wake of the 1911 Standard Oil anti-trust case,[150] Congress was aware of the potentialities for monopoly of oil and gas supplies, and the Leasing Act carefully limited the amounts of public lands which any one person, association, or corporation

could have under lease at any one time.[151] As conditions have changed there have been major relaxations of these restrictions; however, such limitations are a means by which this aspect of the public natural resources is regulated. By increasing or decreasing the acreage limitations, Congress can give due consideration to the needs of the country as compared to the undesirability of allowing a few to get rich off the property of all the people. This flexibility is one of the advantages resulting from retention of ownership by the Federal Government.

Congress also encourages or discourages exploration and development of the public domain by adjustment of the lease royalty rates. This method was employed to encourage exploration between 1920 and 1935 by the issuance of 5% royalty leases. Between 1935 and 1946, essentially a period of plenty, 12½% minimum sliding and step scale leases were used; since 1946, a period of shortage, a flat 12½% non-competitive lease has been used. The drafters of the Mineral Leasing Act recognized the need to reduce the Government's take from a lease when it becomes marginal, and vested the right in the Secretary of the Interior to grant royalty relief in such cases.[152]

An important monetary feature of the Mineral Leasing Act is the channeling of revenue to the States where the leases are located for use in connection with specified programs.[153] This

arrangement, whereby the United States maintains regulatory controls which can be uniformly applied throughout the United States, with the profits going to the States, is a most felicitous compromise between the respective interests of the National and States Governments.

PART TWO: APPLICABILITY OF STATE OIL AND GAS CONSERVATION LAWS TO FEDERAL LESSEES

I. PERTINENCE OF THE SUBJECT.

The Federal form of government, which reserved powers to the States or to the people except insofar as they are expressly or impliedly delegated to the United States, was originally a compromise born of political necessity. After a hundred and seventy years that government has emerged as one which permits, perhaps better than any other that might be devised, State freedom to deal with the nation's problems. And yet the proper relationship of Federal and State governments continues to present perplexing and unresolved problems.

Mr. Ross Malone in 1951 stated:[1]

> The question of the application and enforceability of State proration orders to production from a Federal lease has been the subject of some discussion and speculation. It is the position of the United States that the State has no authority to restrict production from Federal leases but as a matter of comity the United States Geological Survey enforces an identical allocation of production to wells on Federal acreage as that promulgated by the State in which the land is located.

The position of the United States was expressed in 1958 by the Attorney General of the United States as follows:[2]

> The laws governing mineral leasing of public lands stress cooperation with the State conservation programs. Accordingly, Geological Survey works closely with the State officials, and exchanges information and views on current conservation procedures. In general, Geological Survey requires its lessees to follow the market-demand proration or other regulations of the

State within which the land is located. However, although the Secretary of the Interior is himself authorized to limit public land production to market demand, independent of State action, that has not been done.[3]

Whether or not there is a legal requirement for a Federal lessee to comply with State proration statutes will probably be decided by the courts. Such probability warrants an investigation of the applicability of State oil and gas conservation laws to Federal lessees.

II. STATE LEGISLATIVE JURISDICTION.

A. In General.

Legislative is defined as "making or having the power to make a law or laws".[4] Jurisdiction is defined as "the authority by which courts and judicial officers take cognizance of and decide cases."[5] Hence, the phrase "State legislative jurisdiction" means the power of a State legislature to make laws upon which its courts can base judicial decisions. The importance of this power is illustrated by two United States Supreme Court cases decided on the same day: Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,[6] and Pacific Coast Dairy, Inc. v. Department of Agriculture of California.[7] In each case the State officials had sought to enforce State regulations governing the price of milk sold to the Army. In the California case the milk was delivered by the dealer to an area of exclusive Federal jurisdiction; in the Pennsylvania case the United States had no legislative jurisdiction over the area to which the milk was delivered. In the former case, the Court held that the law of the State had no application in the area of exclusive jurisdiction and that it is unnecessary for Congress to speak to effect that result. In the latter case, in which legislative jurisdiction was vested in the State, the Court decided that the operation of the State law did not constitute an interference with

a Federal function and would therefore be valid.

The dissent of Mr. Justice Frankfurter in the Pacific Coast Dairy case clearly indicates the majority of the Court reached opposite results in the cases because of the existence of State legislative jurisdiction in one case and the lack of such jurisdiction in the other.[8] The rule has been recently stated as follows:[9]

> When the Federal Government has acquired exclusive legislative jurisdiction over an area . . . it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area.

and continuing further:[10]

> Such jurisdiction [exclusive legislative jurisdiction in the United States] serves to exclude not only the operation of State laws which constitute an interference with a Federal function, but also the application of State laws which are otherwise not objectionable on constitutional grounds.

B. The Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947.

The Mineral Leasing Act of 1920[11] and the Mineral Leasing Act for Acquired Lands of 1947,[12] in enumerating the lands of the United States subject to disposition, do not exclude lands over which the United States may have exclusive jurisdiction.[13] Land subject to a Federal oil and gas lease may be under exclusive, partial, or concurrent jurisdiction of the United States, or may be land in which the United States has only a proprietory interest.

The relationship of the United States and the States under each type of jurisdiction has been defined in a study titled "Jurisdiction Over Federal Areas Within the States" substantially as follows:

(a) Exclusive legislative jurisdiction: the Federal Government theoretically displaces the State in which the area is contained of all its sovereign authority, executive and judicial as well as legislative.

(b) Concurrent legislative jurisdiction: the Federal Government has what would otherwise amount to exclusive legislative jurisdiction, but the State has reserved to itself the right to exercise concurrently with the United States, all of the same authority.

(c) Partial legislative jurisdiction: the Federal Government has been granted for exercise by it over an area in a State certain of the State's authority, but the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil or criminal process in the area.

(d) Proprietorial interest only: the Federal Government has acquired some right or title to an area in a State but has not obtained any measure of the State's authority over the area.

According to the Pacific Coast Dairy case,[15] supra, if the United States has exclusive legislative jurisdiction over the area under lease, the State conservation statutes can have no application solely on the basis of the State legislative act. This is true even though the regulation only purports to apply to private property, that is, to the lessee's leasehold estate, and not to

the estate of the United States.[16] Manifestly the same is true if, under a condition of partial jurisdiction, the State granted exclusive jurisdiction to the United States with respect to conservation of oil and gas. In this regard, when a State makes reservations of jurisdiction at the same time that it transfers the remaining jurisdiction to the United States, the reservations are strictly construed against the State.[17]

If the legislative jurisdiction of the United States and the State is concurrent, or if the United States only has a proprietorial interest in the land, the applicability of State conservation laws is no longer determinedby the jurisdictional status of the land. As shown by a tabulation in the study "Jurisdiction over Federal Areas Within the States",[18] supra, the vast majority of lands owned by the United States are held in a proprietorial status.[19]

In areas under exclusive Federal jurisdiction Congress has made some of the State laws applicable. For example, the Assimilative Crimes Act, 18 USC 13, adopts certain State criminal statutes. It might be argued that Congress adopted certain of the State's oil and gas conservation statutes by enactment of section 30 of the Mineral Leasing Act of 1920 which provides:[20]

> Sec. 30. . . . Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed . . . and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to

the United States and to the public at reasonable prices for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (Emphasis supplied.)

One argument is that no possibility of conflict with the State laws exists since such laws have no application within the area of exclusive Federal jurisdiction. However, assuming no assimilation of the opposite State laws, the Secretary of the Interior appears to be bound to require substantial compliance by Federal lessees with pertinent State laws. The Secretary, within the spirit of this section, could promulgate conservation regulations more stringent than those of the State of location, but none less stringent.

The case of Murphy Corp. v. Fontenot[21] decided by the Louisiana Supreme Court is in point. A portion of Barksdale Air Force Base was leased for oil and gas development; the State of Louisiana imposed a gas gathering severance tax on the lessee which was paid under protest and was the subject of the litigation. The Base was under the exclusive jurisdiction of the United States and not subject to the Mineral Leasing Acts. However, on the advice of the Attorney General, the President of the United States gave the Department of the Interior authority to lease a portion of the Base, provided there was no interference with the primary use of the Base.

This unusual action was taken because of drainage of oil and gas from under the Base by operations on adjoining privately owned lands. The lease contained a provision that the lessee should pay, when due, all taxes lawfully assessed and levied under the laws of the State or the United States. This provision was identical to one contained in the current Federal lease form.[22] The court upheld the tax but never clearly spelled out its reasoning. The court did emphasize that the lease provision requiring the lessee to pay such taxes would be a nullity unless the tax was held valid. The Supreme Court of the United States denied certiorari.[23]

The taxpayer was not happy with this result and managed to get a second day in court by resorting to Federal jurisdiction. He was no more successful there. He appealed from a decision of the Federal District Court which upheld the tax. Primarily, the appeal was based on the exclusive Federal jurisdiction over Barksdale Air Force Base and the rule that the taxing power of the State is limited to persons within, and subject to, the State's jurisdiction. The Fifth Circuit Court of Appeals upheld the lower court decision.[24] The court concluded that:[25]

> Only after /the gas/ reaches and is severed from the surface and becomes personal property does the tax fall on the severer.

and stated:[26]

> In short, the provision /in the lease that the lessee would pay State taxes/ must and will be construed so

> as to give it effect and as saying in effect that if, under the general laws of the State, the operator would be liable, he cannot draw around himself a cloak of immunity because the United States is lessor, but must, as a part of the consideration for the lease and his obligation under the statute, pay the taxes which the severance tax statutes impose.

The United States Supreme Court denied certiorari.[27]

These cases are significant since they interpret a lease provision which is standard in the usual Federal lease, and also because of the validity extended to a State law within an area of exclusive Federal jurisdiction. An analogy can be drawn between this case and the proper application to be given to section 30 of the Leasing Act, supra. If the lessee cannot claim immunity in the tax situation, he likewise should not have immunity from State oil and gas conservation laws in view of the terms of section 30. A weakness in the analogy is the peculiar facts surrounding the Barksdale Air Force Base lease; this lease was specially authorized and at the time of its execution was known to apply to an area of exclusive Federal jurisdiction. Whereas, section 30 applies to areas under all types of Federal legislative jurisdiction, and could be construed as being applicable to others; therefore, the choice of either considering section 30 a nullity or giving it application to an area of exclusive jurisdiction does not exist.

C. Outer Continental Shelf Lands Act.[28]

In the Outer Continental Shelf Lands Act the phrase "Outer

Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath "navigable waters" as defined in the Submerged Lands Act.[29] The phrase "navigable waters" is defined as waters within the three mile geographical limit around the United States, or waters within the boundary line of the State where such boundary extends seaward or into the Gulf of Mexico beyond three geographical miles.[30]

Presidential Proclamation 2667 of September 8, 1945 was the first assertion on behalf of the United States of jurisdiction, control, and power of disposition over the natural resources of the subsoil and seabed of the Continental Shelf.[31] Congress confirmed the assertion in the Outer Continental Shelf Lands Act.[32]

Mr. Justice Frankfurter, in United States v. California,[33] discussed the ownership of the subsoil of the three mile coastal belt around the United States; he stated, after assuming the area is unclaimed: "I have no doubt that the President and the Congress between them could make it part of the national domain . . ."[34] The President and Congress have acted to make the Outer Continental Shelf part of the national domain.

The Supreme Court in United States v. Louisiana[35] held that although a littoral State makes a claim to coastal areas, as Louisiana did by statute in 1938, the United States still has paramount rights over such areas, "an incident to which is full

dominion over the resources of the soil under that water area, including oil."[36] Assuming that the United States has properly asserted its sovereignty over the Outer Continental Shelf a question definitely settled by the Tideland cases[37] insofar as the States are concerned, it follows that included in its paramount rights is the right to determine the type of legislative jurisdiction it has over such lands.

Congress did this in the Outer Continental Shelf Lands Act (43 USC 1333) by providing:

> (a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf . . . to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . .

The "exclusive jurisdiction" established by this provision would, by the authority of the Pacific Coast Dairy case,[38] supra, exclude the applicability of the State oil and gas conservation laws. However, Congress has provided for a policy of comity with respect to such laws. The Outer Continental Shelf Act states:[39]

> The secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of the subchapter. <u>In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to co-operate with the conservation agencies of the adjacent States</u>. (Emphasis supplied.)

D. Indian Lands.

Strictly speaking the lessee of Indian lands is not a lessee of Federal lands. The fee title to Indian lands is in the United States, but the Indians have the right to occupy and use the lands.[40] It has been stated that "Since the Federal government has exclusive jurisdiction over Indian affairs in matters involving Indian reservations, the state in which the land is situated has no jurisdiction in the absence of specific legislation by Congress."[41] The case authority for this conclusion is Worcester v. Georgia.[42] In this case the Supreme Court of the United States was considering the validity of a law of Georgia which subjected to punishment all white persons residing within the limits of the Cherokee nation, and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in a court of the State. The Court held the law to be repugnant to the Constitution, treaties and laws of the United States, and through the opinion of the Chief Justice Marshall said:

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States.[43]
>
> * * * * *
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees

themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.[11]

The logic of this case is valid today, and will be so as long as Indian lands are considered to be held by a separate and distinct body politic.[15] The oil and gas conservation laws of Utah would be no more applicable against the lessee on Indian lands within the boundaries of Utah than they would be against a lessee operating on private lands in the adjoining State of Colorado.[46]

III. IMMUNITY OF THE UNITED STATES FROM THE STATE POLICE POWER.

A. In General.

If a State has legislative jurisdiction over the lease area, it may exercise such jurisdiction "subject to non-interference by the State with Federal functions, and subject to the free exercise by the Federal Government of rights with respect to the use, protection, and disposition of its property."[47] Hence, a State's attempt to regulate a Federal lessee should be tested to see if it interferes with a Federal function, or if it runs contrary to the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[48]

B. Non-interference by the State with Federal Functions.

A State could argue that the enforcement of its regulations against a Federal lessee is regulation of a private individual with respect to his private leasehold estate; therefore, there could be no interference with a Federal function. A similar argument persuaded the Supreme Court

of Mississippi in Superior Oil Co. v. Berry.[49] There the court considered the validity of a spacing rule adopted by the State Oil and Gas Board which required the pooling of the rights of all owners in drilling units prior to the issuance by the State of a permit to drill on the unit. The rule defined the term "owner", as used in the rule, to mean "The person who has the right to drill into and produce from a field or pool, and to appropriate the production either for himself, or for himself and another."[50] The mineral and royalty owners complained that it was lack of due process to force pool their properties, and a fortiori, when the lessees could pool the leasehold interest without consulting the lessors. The court said:[51]

> . . . such mineral or royalty owners by the execution of the oil and gas leases have divorced themselves from the operations for the production of oil or gas, reserving unto themselves only the right to receive the annual rental provided for in the lease, the royalty to accrue under the lease, and the reversionary interest in fee in the event there is no production from the land during the life of such lease.

Has the United States by execution of the oil and gas lease ceased to have a sovereign interest in the leasehold estate of the lessee? In United States v. General Petroleum Corporation of California it was stated:[52]

> In resolving the foregoing issues /regarding the authority of the Secretary of the Interior to determine the value of oil, natural gas and natural gas gasoline, or any of them for royalty purposes/ it must be remembered that the government's role is taken to be no different from that of any private lessor or proprietor, for while the Kettleman Hills lands involved are public mineral lands, and as such until their disposition are under the supervision and control of Congress, the government as to such lands acts in a proprietary capacity, and treats with them in the same way as does the private landowner. Regardless of the type of lease Congress might authorize, a lease executed in accordance with what it has authorized becomes a private, contractual matter and is to be interpreted according to the general rules of law respecting contracts between individuals.

If the State is only regulating the private right of the Federal lessee, it has almost unlimited police power to regulate and control the drilling for, and production of, oil and gas.[53]

The argument breaks down on the premise that the United States has divorced itself from the operations for the production of oil and gas. The standard Federal oil and gas lease reserves to the United States considerable executory powers insofar as drilling and production is concerned. Examples of such reserved powers are:[54] (1) authority of the Secretary of the Interior to consent to a unit agreement covering the leasehold and to require the lessee to join therein,[55] (2) authority of the Secretary of the Interior to require the lessee to drill and produce such other wells as the Secretary may reasonably require in order that the leased premises may be properly and timely developed and produced in accordance with good operating practice,[56] (3) requirement that the lessee carry on all operations

in accordance with approved methods and practice as provided in the Oil and Gas Operating Regulations,[57] and (4) agreement that the rate of prospecting and developing and the quantity and rate of production from the lands covered by the lease shall be subject to control in the public interest by the Secretary of the Interior.[58]

These are the identical matters that are dealt with by State oil and gas conservation statutes; consequently, State efforts to regulate these matters is an effort to regulate a property right of the United States. The next section discusses the extent to which the State can properly regulate this property right.

One of the functions of the United States under the Constitution is "To regulate Commerce with foreign Nations, and among the several States."[59] Pursuant to this authority Congress has passed the Natural Gas Act.[60] In Cities Service Gas Co. v. State Corporation Commission of Kansas[61] the United States Supreme Court held orders of the Corporation Commission setting a minimum wellhead price for gas to be invalid; the Court held this to be an area of interstate commerce in which Congress had, through the medium of the Natural Gas Act, preempted the field of regulation. The extent to which the Natural Gas Act will invalidate State conservation laws is a matter for future judicial determination. In any event the decisions will have the same effect whether the lessee is one of private or Federal lands.

C. <u>Power of Congress to Make all needful Rules and Regulations respecting Property of the United States.</u>

1. In General.

The Constitution of the United States provides that provisions therein shall be the supreme law of the land.[62] With respect to property of the United States the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[63] The United States Supreme Court in Pollard v. Hagan[64] decided that this clause does not give the United States exclusive legislative jurisdiction over its property within the United States; and the validity of the exercise of the State police power over the public domain was upheld in Omaechevarria v. Idaho.[65] In the latter case the State of Idaho, in an effort to avert clashes between cattle rangers and sheep herders on the public domain, passed a law prohibiting any person having charge of sheep from allowing them to graze on a range previously occupied by cattle; the United States Supreme Court upheld the law and said that "The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject."[66]

The power of the United States to regulate with respect to the public domain is plenary; the Supreme Court in Gibson v. Chouteau said:[67]

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.

That the power is plenary, even though the United States attempts to control the use of its property after its disposal, is illustrated by the United States v. City and County of San Francisco.[68]

That case involved a grant by the United States to the City and County of San Francisco of land in the public domain in the Yosemite National Park and the Stanislaus National Forest. The grant was subject to several express conditions, one of which prohibited the City of San Francisco from ever selling electric energy generated on such lands to any corporation, unless it was a municipality, or to any individual. The United States contended that the City had violated this condition by the sale of power generated on these lands to the Pacific Gas and Electric Company, a private utility. The City countered by contending, in part, that this express prohibition was an unconstitutional invasion of the rights of the State of California since it attempted to regulate the manner in which the electricity should be disposed of in San Francisco. The Supreme Court said:[69]

> Article 4, Section 3, Cl. 2, of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States". The power over the public land thus entrusted to Congress is without limitations . . . Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

If the United States is producing oil and gas from the public domain itself, as it does on the Naval Petroleum Reserves, attempted

State regulation would be a clear interference with a Federal function. If the United States elects to have lessees produce oil and gas from the public domain, Congress can, under its plenary disposal power, lease the lands under any conditions it deems appropriate; in the language of United States v. City and County of San Francisco, supra, Congress "may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy." Therefore, next considered is whether Congress has by express provision, or by inference, excluded the State oil and gas conservation statutes from applying to Federal lease operations.

2. Analysis of Pertinent Provisions of the Mineral Leasing Act of 1920, and the Mineral Leasing Act for Acquired Lands of 1947.

Two provisions of the Mineral Leasing Act of 1920 (30 USC 187, 189 (1958)), neither of which have been amended, are pertinent:[70]

> Sec. 30 . . . . Each lessee shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary [Secretary of the Interior] shall be observed, including . . . and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (Emphasis supplied)

> Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine and boundary lines of any structure, or oil or gas field, for the purposes of this Act: Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (Emphasis supplied.)

The Mineral Leasing Act for Acquired Lands of 1947[71] also gave the Secretary of the Interior authority to prescribe necessary and appropriate rules and regulations with respect to the leases issued under the Act;[72] but this authority was limited as follows:[73]

> Sec. 8. Nothing contained in this Act shall be construed to affect the rights of the State or other local authorities to exercise any right which they may have with respect to properties covered by leases issued under this Act, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

Congress has consistently made the State laws applicable to operations of Federal lessees. This language does more than "stress cooperation with the State conservation programs;"[74] it expressly makes such laws applicable. There is no conflict between Congress giving the Secretary of the Interior authority to make conservation type rules and regulations, and at the same time making the State's conservation laws applicable. There is no consistency among the oil and gas producing States in the scope of their conservation laws, and Congress has essentially authorized the Secretary of the Interior to

supply needed regulations when the State where the land is situated has not done so.

This interpretation of the statutory provisions is consistent with the Connally Hot Oil Act,[75] which prohibits the shipment or transportation in interstate commerce from any State of contraband oil produced in such State.[76] Contraband oil is defined as ". . . petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any . . . duly authorized agency of such State, or any products of such petroleum."[77] This Act clearly puts the imprimatur of Congress on the State conservation laws.

In Mid-Northern Oil Co. v. Montana the United States Supreme Court considered the right of the State of Montana to assess an annual license tax based upon the gross value of the annual production on a lease of Federal lands.[78] The Court upheld the tax on the basis of Section 32, Mineral Leasing Act of 1920, supra, which provides:[79]

> . . . nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, <u>including</u> the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (Emphasis supplied.)

The Court viewed this portion of the Mineral Leasing Act in the following manner:[80]

> The . . . view . . . we adopt, is that Congress, having provided for leasing the public lands to private corporations and persons whose property, income, business and occupations ordinarily were subject to state taxation, meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the government to the lessees thereof nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned.

What is the affect of this decision on the applicability of the State oil and gas conservation laws to Federal lessees? It is determinative; the portion of the Act set out above not only reserves "the right to levy and collect taxes" to the States, it also reserves "any rights which they may have." The Supreme Court, in Omaechevarria v. Idaho,[81] supra, held that the States do have police power over Federal lands. Consequently, until Congress limits that power by specific legislation, the State conservation laws will be applicable over those areas to which the State legislative jurisdiction extends.

IV. CONCLUSIONS.

An essential factor in making State oil and gas conservation measures applicable to Federal lessees is the existence of State legislative jurisdiction. Without this jurisdiction the State laws can have no application unless Congress adopts them. Congress has not adopted them with respect to Indian lands and the Outer Continental Shelf; however, as to the Outer Continental Shelf Congress has expressed a policy of cooperation with the States and the Secretary of Interior will undoubtedly regulate this area so as to substantially comply with the laws of the littoral States.

Federal lands leased under the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947 are normally subject to the State legislative jurisdiction. If they are not, sections 30 and 32 of the Mineral Leasing Act of 1920 (30 USC 187, 189 (1958)) and section 8 of the Mineral Leasing Act for Acquired Lands of 1947 (30 USC 357 (1958)) at the minimum express a Congressional policy of cooperation with those administering the State laws. It might be argued these sections adopt the State laws; however, the better argument is that these sections are designed to apply to areas where the State laws are applicable and have no effect in areas where they are not applicable.

If Mineral Leasing Act lands are subject to the State legislative jurisdiction, Congress in the above cited sections has made the State laws applicable. The Secretary of the Interior can provide for lease provisions or rules and regulations which are more stringent than the State oil and gas conservation laws but he cannot make provisions which are less stringent.

PART THREE: IMPEDIMENTS TO PUBLIC DOMAIN OIL SHALE DEVELOPMENT

I. INTRODUCTION

The estimates of recoverable shale oil in place in the Piceance Basin of northwestern Colorado exceed those for crude oil in the world crude oil reserves.[1] Yet the oil shale in this Basin is but a part of the oil shale resources of the United States.[2] To keep pace with the burgeoning energy demands in the United States and throughout the world this energy source must be developed in the near future.[3] The difficulties of developing public domain oil shale deposits are important since 90 percent of the richest deposits in the United States are on the public domain.[4] The first difficulty discussed, a blanket of mining claims of ancient origin, is peculiar to the public domain, whereas the second, the tax treatment of oil shale, is equally applicable to private and public oil shale lands.

II. TITLE CLOUDS PRESENT ON PUBLIC DOMAIN OIL SHALE LANDS.

Today the right to develop the public oil shale lands can only be acquired under the terms of the Mineral Leasing Act of 1920.[5] The Department of the Interior however has never issued an oil shale lease, ostensibly because of the large number of unpatented mining claims covering such lands.[6]

A. Source of Title Clouds.

Location of mining claims on oil shale lands on a large scale took place from 1915 to 1920 under the Petroleum Placer Act of 1897.[7] This was a period of short supply of crude oil in the United States, a situation aggravated by the heavy demands for crude during the First World War.[8] Over 20,000 oil shale claims were made in Colorado, Utah, and Wyoming, and they virtually blanketed the oil shale deposits.[9] Most of these claims were made on speculation, and little work was ever performed on them.[10] In 1920 the right to claim oil shale deposits under the Petroleum Placer Act was terminated by the Mineral Leasing Act.[11] The discovery of large quantities of crude oil in the United States during the 1920's caused interest in oil shale to wane.

President Hoover by Executive Order in 1930[12] temporarily withdrew, subject to valid existing rights, all deposits of oil

shale and lands containing such deposits owned by the United States from lease or other disposal, "for the purposes of investigation, examination and classification." This order is still in effect and reportedly the Department of the Interior considers it infeasible to revoke the withdrawal because of the large number of outstanding unpatented mining claims on oil shale lands.[13]

The crux of the problem of clearing these unpatented claims from the public domain is the interpretation the Supreme Court has placed upon Section 37 of the Mineral Leasing Act of 1920. This section provides:

> . . . the deposits of oil shale . . . shall be subject to disposition only in the form and manner provided in this Act, <u>except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated</u>, which claims may be perfected under such laws, including discovery. (Emphasis supplied.)

Under the Petroleum Placer Act locators needed to make a discovery, distinctly mark their location on the grounds, and perform at least $100 work on the claim each year.[14] A patent would be issued upon application accompanied with a plat of the location and affidavit of two persons that a notice of the application was posted on the claim, provided the land office published the application in a newspaper for 60 days and applicant certified he had expended at least an aggregate of $500 on the claim.[15]

The Supreme Court interpreted the interrelationship of Section 37, supra, and the applicable placer mining laws in Wilbur v. Krushnic in 1930.[16] The court was considering the refusal of the Secretary of the Interior to issue a patent to an oil shale claimant who failed to perform $100 work on the claim each year since its location. The claimant had otherwise done everything necessary to receive a patent, including an aggregate expenditure of $500 on the claim. The court stated:[17]

> . . . when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by location. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.
>
> Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent locators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted.

After this recitation of the law that existed with respect to oil shale placer claims prior to 1920, the court held that the phrase

in Section 37, which preserved claims "thereafter maintained in compliance with the laws under which initiated", meant that the failure of a claimant to perform the yearly $100 assessment work per year did not give the Secretary of the Interior the right to forfeit the claim and deny an application for patent so long as the claimant resumed work and, during the total period of his location, performed the aggregate of $500 worth of work. The court by dictum indicated the United States might divest the claimant of his right by appropriate action initiated after cessation of the annual assessment work, and prior to resumption of such work.[18] The Secretary of the Interior was led by this dictum to attack claims upon which annual assessment work had not been resumed.[19]

The Supreme Court in Ickes v. Virginia-Colorado Development Corp.[20] cleared up this point by holding that a failure to perform the annual assessment work did not ipso facto cause a forfeiture of the claim, but did make the claim subject to relocation. However, if there was no relocation the claimant could preserve his claim by again performing the annual assessment work.

These decisions produced a peculiar situation. A claimant, who initially made a valid discovery and filed a notice of his claim within the locality as prescribed by local law or custom, had an inchoate right to patent the claim whether or not he

performed any annual assessment work on it. He could not be divested of this right by someone else locating on the claim since the Mineral Leasing Act proscribed any means of acquiring rights to public oil shale deposits except by its terms. No longer is there a law authorizing location of oil shale deposits. This does not mean that the claimant can not be divested of his inchoate right; only that he can not be divested of the right solely because of failure to perform the annual assessment work. The court in Ickes v. Virginia-Colorado Development Corp. stated that the Secretary of the Interior had authority "by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment."[21]

The Department of the Interior however has no simple and inexpensive way of eliminating obviously abandoned claims, or claims otherwise patently defective, e.g., no discovery. The Secretary had attempted to oust the claimants by directing the local land offices to post notices on all unworked claims that the United States assumed title because of failure to perform annual assessment work.[22] The court invalidated this approach in Ickes v. Virginia-Colorado Development Corp.

B. Present Legal Situation Resulting from Title Clouds.

There are two broad categories of factual situations with

respect to these old mineral locations: First, the mineral locations which the Department of the Interior administratively determined to be invalid prior to the Supreme Court decisions in the Krushnic and Virginia-Colorado Development Corp. cases, supra, and second, those locations upon which no final administrative action has been taken.

1. Mining Locations Administratively Invalidated Prior to Krushnic and Virginia-Colorado Development Corp. Cases.

The efforts of Interior to clear title to the oil shale lands during the 1920's and early 1930's resulted in a number of administrative proceedings at which the usual due process requirements of notice, et cetera were followed. The basis for the actions was in some instances the failure to perform annual assessment work, and in others a combination of failure to perform assessment work and an allegation of abandonment. The Supreme Court in the Virginia-Colorado Development Corp. case determined that these proceedings maintained solely on the basis of lack of assessment work were without proper legal foundation, but in dictum indicated that a proceeding based on abandonment would be proper. Acting in conformity with this decision the Commissioner of the General Land Office directed that all pending contests involving the charge of failure to perform assessment work which had not proceeded to final decision be discontinued.[23] Now being questioned is the status of

those administrative contests which had gone to final decision by Interior prior to the Supreme Court decisions.

Successors in interest to these mineral locations have performed a total of $500 assessment work and have applied for patents to the lands.[24] This is an effort to breathe life into mineral locations which Interior has previously invalidated. Interior has taken the position that these claims are invalid on slightly different bases depending upon the substance of the complaint utilized in the administrative proceedings. With respect to those which had the single foundation of failure to perform the assessment work, the Land Office Manager, Bureau of Land Management, Denver, has held that:[25]

> In view of the principles of finality of administrative action, estoppel by adjudication, and res judicata, the Commissioner's decision /of 1932/ must be regarded as conclusive.

As to proceedings based upon both failure to perform assessment work and abandonment, Interior has relied not only on the above arguments, but also on the Supreme Court dictum that a proceeding based on abandonment is proper.[26]

a. Locations Invalidated on Basis of Failure to Perform Assessment Work.

If similar proceedings had not been carried through to final determination within the Interior Department prior to the Supreme

Court decision in the Virginia-Colorado Development Corp. case, they were dismissed.[27] However, as is noted above, the Land Office Manager, Bureau of Land Management, Denver, now takes the position that the decisions in these cases are not now subject to attack. Whether or not the Director, Bureau of Land Management, and the Secretary of the Interior will adopt this position is unknown.[28] A recent decision of the Secretary by dictum seems to approve a contrary statement by the Director, Bureau of Land Management.[29] The Denver office may feel bound by this prior determination because of inter-Departmental rules. It has been stated that:[30]

> No rule is more settled than the rule that the Commissioner /General Land Office, now Director, Bureau of Land Management/ has no authority to overturn the decision of the Department . . .

The earlier Departmental holdings as to the invalidity of these claims will probably be changed only on the Secretarial level of the Interior Department.

The general ground rules which the Secretary will follow are outlined in the following language:[31]

> Although the Department is not controlled in its decisions by the doctrine of res judicata and may open any proceedings and correct and reverse its decision so long as the legal title to the land involved remains in the Government . . . the Department has frequently recognized and applied the doctrine as essential to the orderly administration of the laws of the United States by its executive officers . . . and whenever necessary to protect the rights of the Government and where equity and justice demand it . . .

This Departmental rule would grant the Secretary latitude in these cases. But it must be compared with the axiomatic rule that "The executive department cannot exceed the powers granted to it by the Constitution and Congress, and if it does exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect."[32] The Supreme Court has determined that the former decisions were not authorized by Congress.[33] The Secretary will, it seems, invalidate his prior decisions by his own action, or be compelled to do so by subsequent judicial action.

This does not necessarily mean that those who have purchased these old locations will prevail. The decision of the Land Office Manager, Bureau of Land Management, Denver, did not consider whether these claims were abandoned prior to the effort to revive them by new assessment work; it is based solely upon the legal conclusion that the question of validity or invalidity of the locations is not open for further consideration. Any Secretarial or judicial action should be limited to this legal conclusion, and thereby permit the United States or others to prove, if necessary, in future administrative proceedings that the mining locations were abandoned.

This factual picture will sometimes be complicated because of interests in the lands granted by the United States on the assumption that the old mining locations were invalid.[34] For example,

For example, the United States has issued oil and gas leases to some of these lands. If the ancient mining location is valid, it will be necessary to invalidate the oil and gas lease. If the lessees have expended monies on the leases, or made discoveries, the problem is further complicated. But the course of action of the United States is clear. It must invalidate leases to lands over which it had no authority to lease in the first instance.[35]

The position of the oil and gas lessee vis-a-vis the mining locator is not so bleak. If the locator failed to put the oil and gas lessee on notice as to his latent interest, the equitable position of the lessee is strong. This failure would also strengthen an assertion by the lessee, or the United States, that the mining claim had been abandoned.

b. Locations Invalidated on Dual Basis of Failure to Perform Assessment Work and Abandonment.

This factual situation is now being considered by the Court of Appeals for the District of Columbia in the case styled Gabbs Exploration Company v. Udall.[36] For this discussion the essential facts are that administrative proceedings were instituted in 1930 against several oil shale locations on the basis of failure to perform assessment work and the allegation that "every one of said claims has been abandoned." The record titleholder of the claims defaulted, and the Commissioner of

the General Land Office stated that the "oil shale placers are declared null and void and the United States has taken possession of the lands within the claims for its own uses and purposes." The Gabbs Exploration Company purchased these mineral locations, the requisite assessment work ($500) was performed, and in 1956 Gabbs Exploration Company applied for patent. The Secretary of the Interior rejected the application for patent on the basis of the earlier decision of the Commission of the General Land Office;[37] the Gabbs Exploration Company appealed the decision to the courts, and after an unreported adverse decision by the Federal District Court has appealed to the Court of Appeals.

Two basic arguments are being used to overturn the 1930 Land Office decision. One is the assertion that the original administrative proceedings were invalid since the complaint had merely alleged a conclusion of law, i.e., abandonment, without setting forth any factual basis for the conclusion; the other is that even if the claims were abandoned the United States could not avail itself of such abandonment.

Interior has held in the past that the allegation of a conclusion of law is not a proper basis for an adverse decision.[38] The decisions in these cases however were not being attacked collaterally, as is the decision in the Gabbs Exploration Company case.[39] Interior has also held that an objection to the

sufficiency of a contest charge should be raised by timely demurrer.[40] The Secretary's decision in the Gabbs Exploration Company case distinguished between an allegation of a "conclusion of law" by a private party and the Government.[41] The applicable rules of the Department required that prior to making such an allegation, the General Land Office should consider the facts upon which it would be based and determine if they would support the allegation.[42] A general presumption exists that the General Land Office acted in conformity with these rules.[43] These factors give support to the conclusion that the complaint was valid.

A strong equitable argument might be asserted against this conclusion. For, it may be true, and is being contended, that the allegation of abandonment was but another way of evaluating the failure to perform assessment work. However, the distinction between forfeiture which results from failure to conform to the statutory requirement to perform assessment work, and abandonment which hinges upon the intention of the locator, is clear in the law.[44] Absent evidence to the contrary, the contest complaint listing the two separate grounds should be construed as reflecting an intended distinction between facts which would support each.

The contention that the United States would not automatically assume its full title to the located lands after

abandonment is weak. Case law declares that ground covered by an abandoned claim becomes part of the public domain.[45]

Undoubtedly the Gabbs Exploration Company case is but a forerunner of similar cases which will arise with the increasing value of oil shale deposits. These proceedings should be carefully considered by those desirous of acquiring patents to oil shale lands.

2. Elimination of Title Clouds by Proceedings under the Administrative Procedure Act.

The Department of the Interior can invalidate defective or abandoned oil shale claims by administrative proceedings.[46] To do so, it must first be determined what claims exist in any particular area. Since the Petroleum Placer Act of 1897, under which the oil shale locations were made, did not require that claims be filed with any agency of the United States, local records up to the time of passage of the Mineral Leasing Act of 1920 must be examined. After establishing the names of the initial claimants and the extent of the claim, it is necessary to determine who currently has an interest in the claim.[47] Substantial effort in time and expense is involved. Over 40 years have passed since the latest of these claims was made. Following ascertainment of the adverse parties, notice of the administrative proceeding must be given to them.[48]

Until recently the difficulty of ascertaining interested parties was but one of the roadblocks to instituting administrative proceedings. Interior had ruled that notice by publication was not proper in this type of abandonment proceeding.[49] The rationale of the decision was that Congress has specified the type of proceeding in which notice by publication is proper, specifically that portion of Revised Statute Section 2335 which reads:[50]

> In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper . . .

Hence, the opinion states:[51]

> It is plain that the publication mentioned in this statute is authorized only in cases where the issue is as to the physical character of the land, whether mineral or agricultural. It can not be construed to extend to proceedings where the sole issues are whether mining locations on lands classified as mineral are valid or not, and there is no issue as to the character of the land involved.

To attack these claims on the grounds of abandonment is logical. The fact that assessment work has not been done for 30 to 40 years may not *ipse facto* result in forfeiture of the claim, but it is strong evidence of the intention to abandon. However, after the passage of 40 years due process could seldom be accomplished other than by publication of the notice of hearing.

This impediment to clearing titles was removed by the Interior Solicitor's office in May of 1961.[52] An opinion directed to the Denver Solicitor's office held that service by publication is proper. It was reasoned that although Congress has not specifically authorized publication in such cases, it has given the Secretary of the Interior rule-making authority and that regulations promulgated under this authority have the force and effect of law.[53] The Secretary has implemented this authority by promulgation of Appeals and Contests Regulations[54] and these Regulations provide for service by publication in Government initiated contest proceedings.[55] This decision is consonant with the Administrative Procedure Act which does not prohibit service by publication.[56]

An interesting feature to administrative proceedings instituted today is the quantum of evidence required to establish abandonment. What will establish a prima facie showing that the locators or their successors intended to abandon their mining claims? If the claims had been subject to relocation by others during the past 40 years, the failure of the locators to perform any assessment work in and of itself should suffice. But these claims have not been subject to relocation since the enactment of the Mineral Leasing Act of 1920. Therefore, additional evidence should be required. It would appear that a long continued failure to assert <u>any</u> right over the claim, i.e.,

not only the failure to do $100 in assessment work annually but also the failure to do anything with respect to the land, would establish a prima facie case. This conclusion is bolstered if the failure occurred between 1920 and 1930. It was not until 1930 that the Supreme Court ruled that failure to perform the assessment work would not result in forfeiture of the claim. Interior, which is the trustee of these lands for all the people, will probably tend towards invalidation of such claims.

If Interior accepts such evidence as prima facie establishing abandonment, the courts will be severely taxed to overrule the decision. The court review will be limited to the matters specified in the Administrative Procedure Act. This Act in part provides that the court shall:[57]

> . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (5) unsupported by substantial evidence . . .

Evidence of marginal adequacy at the Interior level of decision should be more than sufficient when tested against these guidelines.

To this point it has been assumed the oil shale mining claims are based upon valid discoveries. Discovery is so important however that it is worthy of mention; without a discovery the locator acquires no rights against the Government.[58]

The mining statutes do not define what constitutes a discovery, but they do prescribe what is to be discovered, namely, "valuable mineral deposits."[59] Since the mineral character of oil shale has never been questioned, discussion will be limited to what is a "valuable" oil shale deposit.

In 1894 the Department of the Interior stated its requirements for discovery as follows:

> . . . where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditures of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statutes have been met.[60]

Presumably in implementation of this general rule, the Department held in 1926 that the adequacy of an oil shale location would be determined by the following requirements:

> . . . (1) Where the oil-shale beds are too deep to be mined by open-cut methods, such lands must contain shale capable of yielding 1,500 barrels of oil per acre, in beds not less than one foot thick yielding not less than 15 gallons per ton and within a reasonable depth below the surface; (2) where the oil-shale beds are at or sufficiently near the surface to be mined by open-cut methods, such lands must contain shale sufficient to yield 750 barrels of oil per acre in beds not less than six inches thick and yielding not less than 15 gallons per ton.[61]

If the Department adheres to the 1926 rule, no legal problems will be involved. There would be a discovery only if the oil shale was rich enough to meet the stated requirements. However, if the more general rule of 1894 is applied, difficult legal

questions arise. With the benefit of hindsight, the prudent man in 1920 should not have expended further labor and means in developing his claim. In fact there has been no expenditure in forty years on most of the claims, and successful commercial oil shale development is still a matter for the future. Of course, the locator in the 1910s did not realize this would be the case, and the test of discovery should be made within the perspective of the locator at the time of his location. But it is difficult to close ones eyes to what has happened since 1920, even though it is legally required. Herein lies the danger of abrogating the 1926 holding.

Assuming application of the 1894 rule, the attitude of the prudent man of today is not germane. Although technical and economic conditions of today might lead a prudent man to make further expenditures on an oil shale claim, this is irrelevant in determining the validity of a pre-1920 location. The discovery had to take place prior to the enactment of the 1920 Mineral Leasing Act, otherwise, there was no mining law extant to give the location legal significance. A discovery does not relate back to the date of location of the claim; a valid location dates from the time of discovery.[62]

Abrogation of the 1926 rule could lead to even more stringent discovery requirements than those of the 1894 rule.

The Department of the Interior's tendency today is to impose a marketability test against purported discoveries.[63] The mineral is considered valuable only if it can be commercially marketed.[64] All oil shale claims would probably fall by the wayside if this test were applied.

There is no reason to believe the Interior Department will attempt to circumvent the 1926 rule, and valid legal reasons exist for not doing so. This rule is an administrative interpretation of an ambiguous statute. The Supreme Court views such interpretations as having the force of law unless there is a clear conflict with Congressional intent.[65]

III. TAX TREATMENT OF OIL SHALE.

The ability to market shale oil competitively with crude oil is the key to the establishment of an oil shale industry; and the tax treatment which would be given to shale oil production is largely determinative of what dollar return an oil shale industry could expect. Yet, the proper treatment under the Internal Revenue Code is not clear.

Congress has established a statutory policy of giving a deduction in the computation of taxable income for exhaustion of capital assets. Section 611(a) of the Internal Revenue Code provides as to natural resources that "there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion." Section 613 provides for the amount of the depletion allowance in part as follows:

> (a) General rule. -- In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property . . .
>
> (b) Percentage depletion rates. -- The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:
>
> * * * * *
>
> (6) 15 percent -- all other minerals . . .
>
> (c) Definition of gross income from property. -- For the purposes of this section --

(1) Gross income from the property. -- The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) Mining. -- The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the treatment processes considered as mining described in paragraph (4) (and the treatment processes necessary or incidental thereto) . . .

* * * * *

(4) Treatment processes considered as mining. -- The following treatment processes . . . shall be considered as mining . . .

* * * * *

(C) in the case of . . . minerals which are customarily sold in the form of a crude mineral product -- sorting, concentrating, sintering, and substantially equivalent processes to bring to shipping grade and form, and loading for shipment;

(D) in the case of . . . minerals which are not customarily sold in the form of the crude mineral product -- crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore or the mineral or minerals from other material from the mine or other natural deposit;

* * * * *

(E) any other treatment process provided for by regulations prescribed by the Secretary or his delegate which, with respect to the particular ore or mineral, is not inconsistent with the preceding provisions of this paragraph.

(5) Treatment processes not considered as mining. -- Unless such processes are otherwise provided for in paragraph (4) (or are necessary or incidental to processes so provided for), the following treatment processes shall not be considered as "mining": electrolytic deposition, roasting, calcining, thermal or electric smelting, refining, polishing, fine pulverization, blending with other materials, treatment effecting a chemical change, thermal action, and molding or shaping.

The percentage depletion rate applicable to oil shale is not specified in the Code. But the Internal Revenue Service has held that oil shale falls within the category of section 613(b)(6), the catchall category for "other minerals" to which a 15 percent rate is applicable.[66]

To what gross income is the 15 percent rate applicable? Is the income measured after the mining and crushing steps have been taken, or after the crushed shale has been retorted?[67] Since the estimated cost distribution among the various processing steps is 30% for mining, 10% for crushing, 20% for retorting, and 40% for refining,[68] this determination can have great impact upon the thinking of private industry as to the economic feasibility of oil shale development. A recent Supreme Court decision and Congressional enactment bear on this question.

Both prior to 1960 and today the statutory definition of "gross income from the property" under section 613, supra, for properties other than oil or gas wells depends on the determination of gross income from "mining".[69] However, prior to 1960 the definition of "mining" included not only "the extraction of the ores or minerals

from the ground but also the ordinary treatment processes normally applied . . . in order to obtain the commercially marketable mineral product or products."[70] A series of decisions by the Courts of Appeal[71] with respect to brick and tile clay and cement rock established that the depletion rate could in certain instances be applied to the finished products made from these materials. The key to these decisions was the court determination that the product resulting from the manufacturing process was the "commercially marketable mineral product." The United States considered the results of these decisions so serious from the standpoint of equity as between taxpayers, the theory of the depletion allowance, and revenue considerations, that it requested the Supreme Court to review a case with a similar factual base.[72] The Supreme Court granted certiorari and in its decision, United States v. Cannelton Sewer Pipe Co.,[73] concluded that:[74]

> Congress intended to grant miners a depletion allowance based on the constructive income from the raw mineral product, if marketable in that form, and not on the value of the finished articles.

This decision was reached in spite of taxpayer's evidence that it could not sell the fire clay it produced at a profit. The Court had evidence that other producers of fire clay were selling the raw product, and stated that such sales indicated fire clay was "commercially marketable" in its raw state unless that phrase also implies marketability at a profit.[75] In essence the Court decided that the depletion allowance was onewhich should be uniformly applied and that

if certain miners could sell the raw material the depletion allowance "cut off" point was at this stage, regardless of the inability of certain integrated miner-manufacturers to sell the raw material at a profit.

Three days after the Supreme Court decision Congress passed legislation which confirmed the Court's conclusion.[76] Section 302 of the Public Debt and Tax Rate Extension Act of 1960[77] amended subsection (c) of section 613 of the Internal Revenue Code of 1954 so that it reads as set out above. Abolished is the phrase "ordinary treatment processes normally applied . . . in order to obtain the commercially marketable mineral product or products." Substituted is the phrase "treatment processes considered as mining" with detailed description of what these treatment processes are.

Against this background what is the proper tax treatment of an oil shale operation? Since the 15 percent depletion rate is applied against the gross income from mining, the critical question is what treatment processes are considered as mining. The Internal Revenue Code does not specify what treatment processes count as mining in an oil shale operation; consequently, the processes described in either section 613(c)(4)(C) or (D), supra, would apply, dependent upon whether or not oil shale is considered a mineral customarily sold in the form of a crude mineral product. In either case the refining step would not be considered a treatment process (see section 613(c)(5), supra). However, as to both (C) and (D) above there is a question as to

whether "concentrating" should be considered to include "retorting" of oil shale.

"Concentration" has been defined as the process by which the desired mineral is separated from the more abundant waste material.[78] Retorting does this; it separates the desired mineral, shale oil, from the waste material, spent shale.[79] Section 613(c)(4)(D), supra, seems to encompass this type of "concentration" since it has a catch-all provision providing for "substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore or the mineral or minerals from other material from the mine or other natural deposit." But section 613(c)(4)(C), supra, even though providing for "concentration" has an overall characterization of processes to bring to shipping grade and form." Considering this characterization together with section 613(c)(5), supra, which excludes "treatment effecting chemical change [and] thermal action" unless otherwise provided for, it seems doubtful if "concentrating" as used in section 613(c)(4)(C) includes "retorting". Hence, whether "retorting" is a treatment process considered as mining could depend upon whether or not oil shale is a mineral customarily sold in the form of a crude mineral product. But there is no existent industry and no existent custom, and, consequently, the issue is in doubt. The Cannelton Sewer Pipe case, supra, could be persuasive in any judicial interpretation of these Code sections. A determination

that the depletion allowance should be allowed after the "retorting" stage would make it virtually impossible for a miner to compete with an integrated operation which would receive a higher depletion allowance by virtue of its higher gross income multiplier.

Obviously the treatment a court might determine to be proper under section 613 as written today is uncertain. Equally obvious, an investor will not venture millions of dollars to finance an oil shale operation which might be profitable only if the depletion allowance is computed after the "retorting" stage. Congress can and should remedy this uncertainty.

IV. COURSES OF ACTION AVAILABLE TO THE UNITED STATES TO FACILITATE DEVELOPMENT OF PUBLIC DOMAIN OIL SHALE LANDS.

In addition to clarifying the tax treatment of oil shale, Congress could stimulate the development of oil shale by increasing the rate for depletion allowance. However, any increase in the depletion rate seems unwarranted, unless Congress clearly deems it in the national interest to subsidize the industry. The great risk that is cited to justify the 27.5% depletion rate for oil and gas is not present. The word duster has no application to oil shale which has been located and assayed with the results readily accessible through Government publications. A decision to subsidize would undoubtedly lead to later pressures to remove the subsidy, presumably after the subsidy had become a fixed part of the price pattern. So long as the nation has a comfortable cushion of crude oil reserves, it seems preferable for shale oil to take its place in the energy market on a non-subsidized basis.

The mining claims on these lands should be cleared. This will take time, and should be done in an orderly fashion. Consequently, Interior should be undertaking the job at this time when there is no inordinate pressure for utilization of the shale lands. To invalidate these claims within the terms of the Administrative Procedure Act is a time consuming operation. A more expedient

method of clearing up the titles might be set up through Congressional action, e.g., legislation requiring claimants to file a notice of their claims or to forfeit their rights. However, even if Congress could be persuaded to enact such legislation, the due process requirements of the Constitution and the general abhorrence of forfeiture that permeates the law would require a careful testing of the legislation in the courts. Because of this, and the relatively small amount of money -- on the Governmental scale -- involved, the tedious procedure of searching titles and service of process on current interest holders is a more desirable approach.

In addition to clearing the way for future shale development, the elimination or validation of the claims can avoid future conflicts between oil and gas lessees and mining claimants. Since these claims in most instances do not appear in the records of the Bureau of Land Management, oil and gas leases have been issued to the lands claimed. The vision of a good gas find with a number of mining claimants filing for patent to the leased lands is not too remote. The Oil and Gas Journal has reported that:[80]

> Geologists expect to see major gas developments in two big basins in the next few years. The two are Piceance Basin of Northwest Colorado and Cook Inlet basin of Alaska. Both have yielded commercial gas fields, and both have vast areas awaiting the drill.

In the order of speculation it is doubted if Interior would recommend the cancellation of the Executive withdrawal of these

oil shale lands from oil shale leasing even if the mining claims are cleared. There are a number of sizeable private holdings of oil shale lands at this time.[31] When the pressures of the market place warrant it these lands will be developed, so what is to be gained by opening up the public lands? Until there is a well founded affirmative answer to this question the lands will not be opened for lease. When there is an affirmative answer, it is unlikely that section 21 of the Mineral Leasing Act of 1920 will be the vehicle of exploitation. Conditions as yet unknown will probably set the standards by which these public lands will be developed.

PART FOUR: THE FUTURE OF THE MINERAL LEASING ACT

There is little reason to believe the basic principles of the Leasing Act will be changed in the future. It has quite successfully provided an avenue for the development of Federally owned mineral resources. But the Act is not perfect. The following discussion relates to changes which would improve it.

LEASE LOTTERIES: The use of a lottery to dispose of public oil and gas leases is hardly an advanced management technique. But, as the law now stands, it is probably the best applicable device under the following circumstances. If a non-competitive lease is expiring the leaseholder has several ways of extending its term, but each way involves a drilling program. Consequently, if the area has promise, but not enough to justify the expenditure of exploratory money, the present holder will reluctantly let the lease expire. Of course, in these circumstances, both the present holder, and others following prospecting developments, will be anxious to acquire a ten year lease for a small money outlay. This formerly led to a race to file on expiring leases. The Bureau of Land Management, to avoid the frustrations and difficulties resulting from such races, has laid down ground rules for the

use of a lottery to dispose of such leases.[1] The rules in summary provide that monthly each land office shall post a notice of leases that are expiring, have been canceled, relinquished, or terminated; lease offerings are accepted on such lands for the next five days. If multiple offerings are received the offer to be accepted is determined by a drawing. Obviously, this leads to filings by those who never intend to explore the property, but hope to win the drawing and market their lease holding for the best price obtainable.

An ~~apt~~ solution to this situation is to make the issuance of the lease competitive. This would have two valuable results: any value that could be attached to gaining the lease would accrue to the United States, rather than to a speculator who happened to be lucky; and would enable any legitimate oil and gas operator who wanted the property for development purposes to get it if he was willing to pay the price, rather than forcing him to take his chances with all others willing to pay the deposit necessary to get in on the drawing. This solution can only be achieved by legislation; the current statutory requirement is for non-competitive leasing unless the land is located on a known geologic structure.

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1. 43 Code Fed. Regs. 192.43 (Cum. Supp. 1962).

ADMINISTRATIVE CANCELLATION OF LEASES: Money and time are often squandered in seeking judicial solutions to problems which Congress can easily solve. An excellent example of this is the present conflict as to the Secretary of the Interior's authority to administratively cancel oil and gas leases.[2] The Secretary is exerting broad powers of cancellation, and segments of the industry are attempting, by judicial action, to limit his exercise of powers.

The nub of the problem is what Congress intended by certain provisions in the Mineral Leasing Act. As to existing leases a judicial solution is necessary; but as to future leases Congress can, and should, clear the air by a definite statement as to how it desires the Leasing Act to be administered. The Constitution vested the care of public lands in Congress, and it is shirking this responsibility by not acting to clear up this situation.

In 1960 Congress gave consideration to the problem, but decided to withhold action pending completion of various judicial actions.[3] Three years later the Supreme Court is

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2. The judicial ramifications of the problem are discussed at page 45, et seq., Part One of this paper.

3. H. Rept. No. 1401, 86th Cong., 2d Sess. at 7.

considering a part of the question.[4] The judicial process is slow, and there is no justification for Congress delaying its action pending the Supreme Court decision or any future judicial action. The responsibility of Congress to act as to the future administration of the Leasing Act is totally unrelated to the judicial responsibility of declaring what Congress intended in the past. An excellent starting point for Congressional action is the language suggested by the late Senator O'Mahoney in S. 2983, 86th Congress. In essence the language would have permitted administrative cancellation of leases of non-producing lands, but require judicial action to cancel leases to producing, or proven lands; if the Secretary thought fraud was involved he could ask the Attorney General to institute judicial proceedings and the court, inter alia, could suspend guilty parties from acquiring interests under the terms of the Leasing Act.

FEDERAL RECORDING ACT: In 1952 one B. D. McDonald, the owner of a 1% override in a Federal oil and gas lease, conveyed the same interest to three different persons. The first person, in time of conveyance, one Dame, filed the conveyance

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4. Boesche v. Udall, 303 F 2d 204 (D.C. Cir. 1961), cert. granted 371 U.S. 886 .

with the Bureau of Land Management in February 1952 but failed to file it with the County Recorder until 1954; the third person, in time of conveyance, one Mileski, filed with both the Bureau of Land Management and the County Recorder in November 1952. The Supreme Court of Wyoming, in Dame v. Mileski (340 P 2d 205 (1959)), held Mileski to be a bona fide purchaser without notice of Dame's earlier interest; therefore, the filing of the conveyance by Dame with the Bureau of Land Management did not constitute constructive notice to future purchasers.

Senator Allott introduced a bill (S. 413) in the 87th Congress which would make oil and gas lease documents filed with the Bureau of Land Management give notice to the world. The bill would not allow constructive notice to flow from the filing of documents in the County Recorder's office alone.

The Rocky Mountain Oil and Gas Association favors the bill, the Western Oil and Gas Association opposes it, and the New Mexico Oil and Gas Association supports it in part.[5] The proponents find it anomalous that a decision such as Dame v. Mileski could be reached; so long as the Government

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5. Hearings before Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs on S. 413, 87th Cong., 2d Sess. (1962).

requires filing with Land Management offices, it seems inappropriate not to protect interests properly filed there. On the other side, the opponents do not favor opening up lease records to all persons, as will be necessary if the recording act provisions are adopted, because of "lease scavengers and hijackers who spend years seeking to find technical defects in title to all and any issued Federal oil and gas leases--particularly if a lease has become productive." Also the opponents fear the enactment of a Federal recording act would merely duplicate the State recording requirements, double the necessary recording fee expenditures, and complicate title research requirements. The Bureau of Land Management neither opposes nor advocates the bill since it is designed to clarify the rights of private parties, and does not refer to any needs of the United States.

The political problem is to reconcile these conflicting views into an acceptable bill. Duplicative filing should not be necessary; and the duplication can only be eliminated by disposing of the need for filing in the County Recorder's office. Such a statute would result in great savings in the cost of title searches; the mineral titles would not, as they should not, be involved in records concerning surface titles.

APPENDIX A

CHRONOLOGICAL LISTING OF MAJOR CONGRESSIONAL ENACTMENTS AND EXECUTIVE ACTIONS WHICH HAVE AFFECTED OIL, GAS, AND OIL SHALE DEVELOPMENT IN THE PUBLIC DOMAIN

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1859-1866	During this period no federal statute applied generally to the mineral resources on the public domain; in California a system of appropriation developed by custom in the mining communities.
1866 (July 4); 14 Stat. 86	"In all cases lands valuable for minerals shall be reserved from sale . . ."
1866 (July 26); 14 Stat. 251	"Sec. 1. That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States . . . subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." "Sec. 2. . . . whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, . . . it . . . may be lawful for said claimant . . . to enter such tract and receive a patent therefor . . ."
1870 (July 9); 16 Stat. 217	". . . claims usually called 'placers', including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent . . . under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; . . ."
1872 (May 10); 17 Stat. 91	General Mining Act reenacted provisions of Acts of 1866 and 1870.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1897 (Feb. 11); 29 Stat. 526	". . . That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

NOTE: Since the 1870 Placer Act provided for placer claims to be made the same as claims were made for veins or lodes, the miners' local regulations were recognized to the extent not in conflict with laws of the United States, or with the laws of the apposite State or Territory Rev. Stat. Sec. 2324 (1875). Specific federal requirements were for the location to be distinctly marked on the grounds so that its boundaries could be traced, and for at least $100 worth of labor to be performed or improvements made during each year. Rev. Stat. Sec. 2324 (1875). Although it was often more noted for its breach that for any other reason, the law did require a discovery prior to a location; " . . . no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat. Sec. 2320 (1875). Patent could be achieved by an application to the land office which would include a plat showing the boundaries of the claim and affidavit that the plat and a notice of patent application had been posted on the ground claimed; thereafter the land office would make newspaper publication of the patent application for sixty days and if no adverse claims developed the patent would issue. Rev. Stat. Sec. 2325 (1875). The mineral laws were primitive because of the undeveloped state of the lands being exploited; this is indicated by the provision that the monuments locating the boundary of the claim "shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern . . ." Rev. Stat. 2327 (1875). The Act of July 9, 1870 provided that "no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons . . ." Rev. Stat. Sec. 2330 (1875). Any placer claim, not including a vein or lode claim, could be patented for $2.50 per acre, together with all costs of proceedings. Rev. Stat. Sec. 2333 (1875).

1909 (Sept. 27); Executive Order	The Secretary of the Interior issued an order withdrawing from entry a large number of acres of supposedly oil lands "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, . . . All locations or claims existing and

Date and Reference	Summary or Excerpt from Statute or Executive Order.
	valid on this date may proceed to entry in the usual manner after field investigation and examination." This was the first of several land withdrawals for the same stated purpose.
1910 (June 25); 36 Stat. 847; 43 U.S.C. 141 (1958)	The so-called Pickett Act gave the President the power to make withdrawals for public purposes to be specified in the orders of withdrawals; such withdrawals remain in force until revoked by the President or by an act of Congress. This Act protected the rights of any locator who, at the date of an order of withdrawal, was a bona fide occupant or claimant of oil lands and who, at such date, was in diligent prosecution of work leading to the discovery of oil so long as he continued in diligent prosecution of the work.
1910 (July 2); Executive Orders	The President, after the enactment of the Pickett Act, confirmed the earlier land withdrawals.
1911 (Mar. 2); 36 Stat. 1015	"That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein . . .: Provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry."

NOTE: Congress was recognizing local customs. To have a valid location a discovery was required by Rev. Stat. Sec. 2320 (1875); however, the custom in California was to make a paper location which would be assigned to a corporation which would explore for oil. The land office took a dim view of this procedure (Lindley on Mines, Sec. 437 states:

The Land department has uniformly held that discovery is essential in the case of placers, going so far at one time as to hold that such discovery was essential in each 20 acre tract within a location of 160 acres located by an association of persons.); and it was to protect assignees of the paper locators who had subsequent to the land withdrawals proceeded with diligence to prove up their inchoate claims that this statute was passed. Generally on this matter, see hearings held before the Committee on Public Lands of the House of Representatives on H.R. 31437 on January 21, 1911, 61st Cong., 2d Sess.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1914 (Aug. 25); 38 Stat. 708	Subsequent to theland withdrawals the Department of Justice contested many of the titles to oil and gas properties. Because buyers were reticent to take oil from lands with a cloud on the title, this statute was enacted to facilitate the disposal of oil from property, title to which was questioned. The statute provided that if an application had been made for lands on which oil and gas was discovered prior to the land withdrawal, or if drilling operations were in progress at the time of the withdrawal, and if the Secretary of the Interior had made no final determination regarding the issuance of a patent, the Secretary of the Interior was authorized to enter into agreements with the patent applicants as to what should be done with proceeds from the questioned lands.
1920 (Feb. 25); 41 Stat. 437	Sec. 1. ". . . deposits of . . . oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests /excluding those acquired under Appalachian Forest Act, national parks, and lands withdrawn for military purposes/ . . . shall be subject to disposition in the form and manner provided by this Act to civilians of the United States, or to any association of such persons, or to any corporation . . ." There was reserved to the United States the right to helium. Foreigners could not hold any interest to a lease through stock ownership if their country did not allow United States citizens to hold similar interests.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1920 (Feb. 25); 41 Stat. 437	Sec. 2-8 and 9-12 dealt with leasing of coal and phosphate deposits respectively.

Sec. 13. The Secretary of the Interior was authorized to grant "under such necessary and proper rules and regulations as he may prescribe" a prospecting permit for not more than two years, which permit gave an exclusive right to prospect for oil or gas upon an area not to exceed 2,560 acres, in reasonably compact form, which area did not lie within "any known geological structure of a producing oil or gas field." The permittee was obligated to commence drilling within 6 months, to drill within 1 year one or more wells to a depth of not less than 500 feet, and to drill within 2 years an aggregate depth of not less than 2,000 feet. An applicant could obtain a 30 day preference right to a permit by the erection of a monument not less than 4 feet high and the posting of a notice that a permit was to be sought.

Sec. 14. Upon discovery of oil or gas the permittee was entitled to a lease of one-fourth of the land embraced in the permit, or a minimum of 160 acres, for a term of 20 years at a 5% royalty. The permittee had a preferential right to lease the remainder of the permitted area at a royalty of not less than 12½%, "and under such other conditions as are fixed for oil or gas leases in this Act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe: Provided, That the Secretary shall have the right to reject any or all bids."

Sec. 15. Permittee was to pay a 20% royalty on production prior to application for lease.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1920 (Feb. 25); 41 Stat. 437	Sec. 16. Generally no drilling could take place closer than 200 feet to outer boundary of the permit or lease. Explorations and operations were to be carried on so as "To prevent waste of oil or gas." Violations of this section were grounds for forfeiture of the permit or lease "through appropriate proceedings in courts of competent jurisdiction."
	Sec. 17. ". . . all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field . . . not subject to preferential lease, may be leased by the Secretary of the Interior by competitive bidding." The lease was to contain not more than 640 acres, be for not less than 12½% royalty, and for a term of 20 years. Lease was to be renewable for successive 10 year periods "upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods." The Secretary was authorized to reduce the royalty on wells producing 10 barrels per day, or less. The renewal and royalty relief provisions were applicable to all oil and gas leases issued under the Act.
	Sec. 18-19. Relief provisions for claimants upon withdrawn public oil lands.
	Sec. 20. Gave preferential right to permit or lease to certain agricultural land entries.
	Sec. 21. OIL SHALE LEASES. The Secretary of the Interior could grant lease of oil shale deposits "under such rules and regulations, not inconsistent with this Act, as he may prescribe." No lease was to exceed 5,120 acres. Indeterminate term. Royalty as specified in the lease, with royalties subject to readjustment at the end of each 20 year period. Secretary could waive rentals and royalties for five years to encourage production of oil from shale,

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1920 (Feb. 25); 41 Stat. 437	"Provided, That any person having a valid claim to such minerals under existing laws on Janaury 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease . . ." Not more than one lease could be granted to any one person, association, or corporation.

Sec. 22. Alaska Oil Proviso.

Sec. 23-25. Dealt with leasing of sodium deposits.

General Provisions Applicable to Coal, Phosphate, Sodium, Oil, Oil Shale, and Gas Leases.

Sec. 26. The Secretary of the Interior should reserve and exercise authority to cancel any prospecting permit "upon failure of permittee to exercise due diligence in the prosecution of the prospecting work."

Sec. 27. Acreage Limitation Provisions. " . . . no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field." It was further provided that this limitation could not be exceeded by holdings of stock or interests in associations or corporations. "Any interest held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General . . ."

Sec. 28. Rights of way through public lands, including forest reserves, of the United States were granted for purposes of pipeline transportation of oil or natural gas from leases "under such regulations as to survey, location, application, and use as may be prescribed

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1920 (Feb. 25); 41 Stat. 437	by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers." Government lessees operating or controlling any pipe line "shall at reasonable rates and without discrimination accept and convey oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act."
	Sec. 29. Reservation to the United States to grant easements and rights of way across any permits or leases issued under the Act; or to dispose of land surface to the extent not necessary for use of the lessee.
	Sec. 30. Prohibits assignment of lease without consent of the Secretary of the Interior. Various required lease provisions relating to working conditions, etc. include below: Lease shall contain provisions "for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property" and a provision "that such rules . . . for the prevention of undue waste as may be prescribed by said Secretary shall be observed" . . . "Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated."
	Sec. 31. Lease may be forfeited and cancelled by "an appropriate proceeding in the United States district court" whenever the "lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease."
	Sec. 32. ". . . the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act . . . Provided, That nothing in this Act shall be construed or held

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1920 (Feb. 25); 41 Stat. 437	to affect the rights of the States or other local authority to exercise any rights which they may have . . ." Sec. 33. Statements, representations, or reports to be under oath, or in such form as specified by the Secretary of the Interior. Sec. 34. Act applies to lands which United States has or may dispose of under laws reserving to the United States the mineral deposits. Sec. 35. Disposition of Royalties. 10% of bonuses, royalties, and rentals to United States Treasury, 52½% to the reclamation fund, and 37½% to State where minerals are located, "said moneys to be used by such State . . . for the construction and maintenance of public schools or other public educational institutions . . ." Sec. 36. The United States may on demand of Secretary of the Interior take its royalty oil or gas in kind. Such royalty oil or gas is to be sold at public sale, unless the Secretary of the Interior determines it is in the public interest to sell at a private sale, or accept the value thereof from the lessee. Sec. 37. ". . . the deposits of oil, oil shale, and gas, herein referred to . . . shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at the date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Sec. 38. The Secretary of the Interior was to prescribe fees and commissions to be paid registers and receivers of the United States land offices on account of business transacted under the provisions of this Act.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1926 (Apr. 30); 44 Stat. 373	Sec. 27 Amended so that the limitation on holdings by any person, association, or corporation was not more than 7,680 acres in any one State, and no more than 2,560 acres within the geologic structure of the same producing oil or gas field, whether such acreage was held by lease or permit, and whether held directly or indirectly.

NOTE: The legislative change which made the holding of permits, as well as leases, the subject of acreage limitations confirmed an Interior Department administrative practice. The Department had held in 51 L.D. 135, 137 (1925) that "There is no reference in section 27 of the leasing act to prospecting permits, but since a discovery under a permit gives the permittees a right to a lease, the limitations of section 27 of the said act have been regarded as applicable to holdings under permits." The change from a proscription against holding more than a certain number of leases within one State or on a known geologic structure to a proscription against a certain amount of acreage was necessitated by an Interior Department holding that differentiated between the amount of land which might be held directly by lease or permit, and the amount which might be held indirectly by lease or permit. The Department held in 50 L.D. 652, 654, 655 (1924) that "The limitation as to direct holdings is on the number of leases (or permits) which may be held, and restricts persons, associations, and corporations equally, to one lease (or permit) upon a geologic structure, and to not more than three such leases (or permits) in a State. As to indirect interests, however, there is a general limitation upon persons, associations, and corporations, in terms of acres, which limits them to aggregate interests, direct and indirect, in 2,560 acres not on a geologic structure, and to 7,680 acres in a State."

1931 (Mar. 4); 46 Stat. 1523	Sec. 17 Amended so that leases committed to a cooperative or unit plan of development or operation, which plan has been approved by the Secretary of the Interior as necessary or convenient in the public interest, shall continue in force beyond their initial 20 year term until the unit plan is terminated. It provided that "Any cooperative or unit plan of development or operation, which includes land owned by the United States, shall contain a provision whereby authority, limited as therein provided, is vested in the Secretary . . . to alter or modify from time to time in

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1931 (Mar. 4); 46 Stat. 1523	his discretion the quantity and rate of production under said plan." It provided that "The Secretary of the Interior . . . with the consent of lessee . . . /could/ suspend or modify the drilling or producing requirements of any oil and gas lease heretofore or hereafter issued . . ." Sec. 27 Amended to allow permittees and lessees to enter unit type agreements when the Secretary of the Interior determined it to be necessary or advisable in the public interest. Permitted the Secretary, with the lessee or permittee consent, to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases or permits. Provided that when a portion of a prospecting permit was determined to be within the limits of a producing oil or gas field and the permit was included in a unit operating agreement a lease would issue to that portion of the permit within the unit without further proof of discovery. Authorized the Secretary to approve operating, drilling, or development contracts made by permittees or lessees regardless of acreage limitations, when the conservation of natural products or the public convenience or necessity required it.
1933 (Feb. 9); 47 Stat. 798	Sec. 39 Added. If the Secretary of the Interior should direct, or agree to, suspension of oil and gas production in the interest of conservation, lease term extended for such period of suspension, and lease rentals suspended.
1935 (Aug. 21); 49 Stat. 674	Sec. 13 Amended so that applications for prospecting permits filed more than 90 days after effective date of Act would be considered as a lease application. Any prospecting permit, prior to its termination, could be exchanged for a lease of same area as that covered by prospecting permit at a royalty of not less than 12½%. Such leases were not to be subject to acreage limitations of Sec. 27 until one year after discovery of oil and gas. Extended all

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1935 (Aug. 21); 49 Stat. 674	outstanding prospecting permits until Dec. 31, 1937, and gave the Secretary of the Interior discretionary authority to extend permits until Dec. 31, 1938.
	Sec. 14. Amended so that leases based upon discoveries under prospecting permits should be issued to $\frac{1}{4}$ of the permitted area for 5% royalty, $1 per acre per year rental, 20 year term renewable for successive 10 year periods "upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior"; provided, if the lease became the subject of a unit plan, it was extended until termination of the unit. The preferential right of the permittee to lease the remainder of the permitted area was restricted to a royalty of not less than 12½% and for a term of 5 years if the land was not within any known geologic structure of a producing oil and gas field, and for a term of 10 years if the land was within any known geologic structure of a producing oil and gas field, and in either case the lease would continue so long as oil and gas was produced in paying quantities. A rental of not less than 25 cents per acre per year was set for the preferential leases.
	Sec. 17. Amended so that competitive leases of lands "known or believed to contain oil or gas deposits" would be at not less than 12½% royalty, with an annual rental of not less than 25 cents per acre, on not more than 640 acres, and for 10 years or so long thereafter as oil or gas is produced in paying quantities. Non-competitive leases of lands not within any known geological structure of a producing oil or gas field would be issued to first applicant; the royalty would be flat 12½% for production up to 50 barrels per day per well per calendar month, and not less than 12.5% for average production exceeding 50 barrels per day, and the term would be 5 years or so long as oil or gas is produced in paying quantities. Three additions to the section in the field of conservation were: (a) lands within unit plan areas were excluded from acreage limitation computations, (b) authorized the Secretary to issue future leases on the condition that the lessee enter into unit or

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1935 (Aug. 21); 49 Stat. 674	cooperative plans deemed advisable by the Secretary, and (c) when lands owned by the United States were being drained by lands not so owned, the Secretary of the Interior could negotiate compensatory agreements to reimburse the United States, and its lessees and permittees, but only with the agreement of the lessees or permittees. The Secretary of the Interior was given authority to cancel leases not known to contain valuable deposits of oil or gas, after 30 days' notice, if the lessee violated any of the terms of the lease; "Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act", that is, by judicial action. The Secretary was given considerable control over the rate of production from leased lands by the provision that unit agreements should authorize the Secretary "limited as therein provided ... to alter or modify ... in his discretion the rate of prospecting and development and the quantity and rate of production," and the provision that the Secretary could, with the consent of the lessee, suspend or modify the drilling or producing requirements of non-utilized leased lands. Sec. 28 Amended so that rights of way issued under the terms of the section shall be conditioned "upon the express condition that such pipe lines shall be . . . maintained as common carriers . . . and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties . . . determine to be reasonable." In addition to the foregoing amendments the Act authorized the issuance of new leases in exchange for leases already held under the Act, but not at a royalty rate of less than 12½% and "upon such other terms and conditions as the Secretary of the Interior shall by general rule prescribe."

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1935 (Aug. 21); 49 Stat. 674	Provided, That no limitation of acreage not provided for in the law or regulations under which any such old lease was issued shall be applicable to any such new lease."
1940 (July 8); 54 Stat. 742	In regard to leases issued under Sec. 17 of the Act of February 25, 1920, as amended, the Secretary of the Interior shall waive payment of lease rentals for second and third lease years in the case of lands not within any known geologic structure of a productive oil or gas field.
1942 (July 29); 56 Stat. 726	Upon expiration of 5 year non-competitive leases issued pursuant to the Act of August 21, 1935, the record title holder has a preferential right to a new lease, if application is made 90 days before lease expiration, and if leased land is not within a known geologic structure of a producing oil or gas field at time of lease expiration. The statute also authorized compromise settlement of rental claims under leases issued under sec. 13, if such compromise is beneficial to the U.S. or if full collection is inadvisable because of the limited financial resources of the lessee.
1942 (Dec. 24); 56 Stat. 1080	Lessees discovering new oil or gas fields would pay flat 12½% royalty as to such new deposits for 10 years following date of discovery. This right was abolished by Congress by Joint Resolution of July 25, 1947 (61 Stat. 449).
1943 (Dec. 22); 57 Stat. 608	Amended 56 Stat. 726, supra, by adding sentence which extended term of any five-year lease expiring prior to Dec. 31, 1944, and for which no preference right to a new lease is granted, to Dec. 31, 1944.
1944 (Sept. 27); 58 Stat. 755 1945 (Nov. 30); 59 Stat. 587	Each of these statutes amended 56 Stat. 726, supra, in the same fashion as did 57 Stat. 608, supra, except that the terminal dates in each instance were Dec. 31, 1945 and Dec. 31, 1946, respectively.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1946 (Jul. 13); 60 Stat. 533	Amended sec. 36 to provide a preference right to refineries without a supply of crude oil of their own to purchase U.S. royalty crude oil.
1946 (Aug. 8); 60 Stat. 951	Sec. 17 Amended to provide for competitive leasing of lands within known geological structures in blocks of not more than 640 acres at a royalty of not less than 12.5% and for a term of 5 years or so long thereafter as oil or gas is produced in paying quantities. Non-competitive leases were to be issued to the first applicant at a flat 12.5% for 5 year terms or so long thereafter as oil or gas is produced in paying quantities; provided, the lessee had a preference right to one 5 year renewal if the lease was not within the known geological structure of a producing oil or gas field, if nototherwise provided by law at such time. Rental was not less than 25¢ per acre per annum, except as to leases not within any known geological structure of a producing oil or gas field on which second and third lease year rentals were waived. The Secretary had authority to negotiate compensatory agreements if United States lands were being drained. Sec. 17(a) Added. 20 year leases, or renewal leases issued therefor, could be exchanged for new 5 year lease at not less than 12.5% royalties, provided that a flat 12.5% 5 year lease would be issued (1) as to portion of lease not within "productive limits of any producing oil or gas deposits," (2) as to production discovered after May 27, 1941 which is determined by the Secretary to be a new deposit, and (3) as to unit production discovered after May 27, 1941 which is determined by the Secretary to be a new deposit. Sec. 17(b) Added. Unit plans authorized when Secretary of the Interior determines such to be necessary or advisable in the public interest. Authorized Secretary, with consent of

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1946 (Aug. 8); 60 Stat. 951	lessee, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of leases committed to units. Authorized Secretary to provide in future leases that the lessee would unitize under unit plans prescribed by the Secretary. Unit plans "may, in the discretion of the Secretary, contain a provision whereby authority is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan, to alter or modify . . . the rate of prospecting and development and the quantity and rate of production under such plan." Unitized leases were excluded from acreage limitations. Leased lands could be joined in "communitization or drilling agreement providing for an apportionment of production . . . among separate tracts of land . . . when determined by the Secretary of the Interior to be in the public interest." Authorized subsurface storage of oil or gas on leased lands.
	Sec. 27 Amended. Acreage limitations were increased to 15,360 acres in any State, and acreage limitations on known geologic structures were abolished. Leases owned in common by two or more persons are chargeable, insofar as acreage limitations are concerned, only as to the percentage interests of the person or persons. Excluded nonrenewable options to purchase leases, which options were taken for geological or geophysical work, from acreage limitation computations, provided the total acreage under option in any one State did not exceed 100,000 acres, and that the options were not for over two years without express approval of the Secretary of the Interior. Required filing of statements by optionees semiannually of options held. Provided, that interests held in violation of the Act were subject to cancellation or forfeiture "in any appropriate proceedings instituted by the Attorney General."

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1946 (Aug. 8); 60 Stat. 951	Sec. 30(a) Added. Permitted partial assignment of leases upon approval by the Secretary of the Interior. Provided, that if portion of lease assigned was undeveloped, but portion retained is in extended term because of production, the assigned undeveloped portion would be extended for two years or so long thereafter as oil or gas is produced in paying quantities. If portion of lease retained was within primary term, the assigned portion would continue for this primary term, but in any event "for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease."
	Sec. 30(b) Added. Permitted relinquishment of all or part of lease (legal subdivision) by lessee at any time.
	Sec. 31 Amended. Lease could be forfeited or canceled by appropriate judicial proceedings for failure to comply with Act or regulations issued under Act. Leases issued after Aug. 21, 1935 subject to cancellation on 30 days notice for failure to comply with lease terms, unless lease covers land containing known valuable deposits of oil or gas.
	Sec. 39 Amended. Secretary authorized in interest of conservation to "waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty", or to direct or assent to suspension of operations and production. In the event of suspension of operations and production, rental and minimum royalties suspended and term of lease extended equal to period of suspension.
	Royalty rates on non-competitive leases issued or to be issued reduced to 12.5%.
	Repealed Act of July 8, 1940 [pertained to waiver of 2nd and 3rd year lease rentals],

ate and Reference	Summary or Excerpt from Statute or Executive Order.
946 (Aug. 8); 0 Stat. 951	section 1 of Act of July 29, 1942, as amended, /pertained to preference right to renewal of non-competitive 5 year leases/ and section 2 of Act of Aug. 21, 1935 /pertained to right to exchange leases for new leases under terms of 1935 Act/. Rights vested by virtue of leases issued under prior acts were not to be effected, but lessees could file to make his lease subject to terms of this Act.
948 (June 1); 2 Stat. 285	The Act of August 8, 1946 which placed a limitation on the acres which could be held under option (100,000 acres) had provided that "nothing in this section /27/ shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised within two years after the passage of this Act." The Act of June 1, 1948 struck out "within two years after the passage of this Act" and inserted in lieu thereof "on or before August 8, 1950."
948 (June 3); 2 Stat. 289	Section 6 of this Act amended section 27 of the Mineral Leasing Act of 1920, as amended, to read slightly different, but made no substantive changes insofar as oil, gas, and oil shale are concerned. Section 7 of this Act amended section 39 of the Mineral Leasing Act of 1920, as amended, by including "oil shale, phosphate, sodium, potassium and sulfur" within its terms.
950 (Aug. 3); 4 Stat. 402	Amended section 35 of the Mineral Leasing Act of 1920 "to provide that payments to States . . . shall be made biannually."
953 (Aug. 12); 7 Stat. 557	Amended section 28 of the Mineral Leasing Act of 1920 by adding the following proviso: "Provided, That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1953 (Aug. 12); 67 Stat. 557	to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality."
1954 (July 29); 68 Stat. 583	Amended 2d paragraph of section 17 to allow 60 days to start reworking or drilling operations when production ceases on a lease which is being held by production.
	Amended 3rd paragraph of section 17 to allow 5 year extension to record titleholder in the case of a non-competitive lease when the lease is not within the known geologic structure of a producing oil or gas field, and a 2 year extension if it is within the known geologic structure of a producing oil or gas field. /Note: under the Act of August 8, 1946 a 2 year extension was only allowed if diligent operations were being carried on at the time of lease expiration./
	Amended 5th paragraph of section 17 to provide for extension of lease in connection with which compensatory royalty is being paid for the period of such payments plus one year after the cessation of the payments.
	Amended 2d sentence of 4th paragraph of section 17(b) to provide for extension of lease committed to unit plan agreement if production is had within unit anytime within either primary or secondary term of the lease. Also provided for segregation of non-unitized portion of lease into a separate lease with a 2 year term which could be held thereafter by production in paying quantities.
	Amended 5th paragraph of section 17(b) to exclude from acreage holding limitations leases "operated under approved operating, drilling, or development contracts."
	Amended section 30(a) to allow assignment of part of a lease even if the lease was extended for any reason under the Act.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1954 (July 29); 68 Stat. 583	Amended section 31 by adding a sentence to automatically terminate a lease upon failure to pay lease rental on or before anniversary date of lease, provided the lease did not have a well on it capable of producing oil or gas in paying quantities.
1954 (Aug. 2); 68 Stat. 648	Amended section 27 to increase maximum acreage which may be held under lease from 15,360 acres to 46,080 acres; the maximum term of options from 2 years to 3 years; and the maximum acreage under option from 100,000 acres to 200,000 acres.
1957 (July 10); 71 Stat. 282	Amended section 35 to provide that 52½ percent of the U.S. royalties collected in Alaska would be paid to the Territory of Alaska for disposition by the Legislature of the Territory.
1958 (July 7); 72 Stat. 339	The Act admitting the State of Alaska into the Union made certain appropriate changes in the Mineral Leasing Act because of the change from Territorial to State status. See sections 6(h), 6(k), and 28(b).
1959 (Sept. 21); 73 Stat. 571	Amended section 27 to provide that bona fide purchasers of leases, options for a lease, or interests in leases who are not themselves in violation of the acreage holdings under the Act should not have their interests canceled or forfeited by virtue of the violations of their predecessors in title. During proceedings with respect to violations of the Act, lease interests may be extended for the period of proceeding by filing with the Secretary of the Interior a waiver of rights to drill or assign under the lease.
1960 (Sept. 2); 74 Stat. 781	Amended Sections 17, 17(a), and 17(b) so that the terms of these sections appear in Sections 17(a), (b), (c), (d), (e), (f), (g), (h), (i), and (j). In addition to this stylistic change, the sections were amended to provide for the following substantive matters:

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1960 (Sept. 2); 74 Stat. 781	(1) Lease rental increased to "not less than 50 cents per acre" with no waiver of 2d and 3rd year rentals (section 17(d)); (2) Primary term of noncompetitive leases increased to 10 years; any lease committed to a unit plan and "actual drilling operations" are commenced under the plan and are being "diligently prosecuted" the lease term shall be extended for 2 years, and similar extension for any lease if it is not committed to a unit plan and the drilling operations are on the lease (section 17(e)); (3) Added provision that in the event an adverse mining claim is filed under the Multiple Mineral Development Act (68 Stat. 708), the running of time against the lease will be suspended as to the lands involved in the claim until a final decision has been rendered (section 17(h)).
	Amended Section 27 so that the terms of this section appear in Sections 27(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k). In addition to this stylistic change, the section was amended to provide for the following substantive matters: (1) Combined acreage limitations on leases and options provided to be a total of 246,080 acres, but total acreage under option could only be 200,000 acres; changed acreage limitations as to Alaska (section 27(d)); this section also made other technical changes with respect to reporting on options, etc.; (2) Delineated rules of acreage chargeable to shareholders in associations and corporations (section 27(e)).
	Section 4(a) of this Act extended the rights to extension of existing leases in accord with law existing prior to this Act, i.e., noncompetitive lease for five years if not within known geologic structure, for two years if within known geologic structure, and any lease if primary term and drilling operations are being maintained for a two year period.
	Added section 42 which placed time limit on contesting decisions of Secretary to within 90 days after final decision of the Secretary.

Date and Reference	Summary or Excerpt from Statute or Executive Order.
1960 (Sept. 2); 74 Stat. 781	Amended last sentence of Section 30(a) so that only partial assignment of lease held by production or payment of compensatory royalty would be extended for 2 years or so long as production is maintained (applies to both assigned and retained portion of lease). Amended sections 1, 21, and 34 to provide for "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)"; section 21 placed limit of 7,680 acres in any one State on native asphalt type leases and added two subsections to section 21 dealing with this type lease.

APPENDIX B

REFERENCES TO STATUTES AMENDING MINERAL LEASING ACT OF 1920 (41 STAT. 437)

A. Chronological listing of statutes amending Mineral Leasing Act of 1920 insofar as oil, gas, and oil shale provisions are concerned:

1922 (42 Stat. 356)[1]	1940 (54 Stat. 742)[3]	1949 (63 Stat. 682)[3]
1926 (44 Stat. 236)[1]	1942 (56 Stat. 726)[3]	1950 (64 Stat. 402)
1926 (44 Stat. 373)	1942 (56 Stat. 1080)[3]	1953 (67 Stat. 557)
1928 (45 Stat. 252)[1]	1943 (57 Stat. 593)[4]	1954 (68 Stat. 583)
1930 (46 Stat. 58)[1]	1943 (57 Stat. 608)[3]	1954 (68 Stat. 648)
1930 (46 Stat. 1007)[2]	1944 (58 Stat. 755)[3]	1957 (71 Stat. 282)
1931 (46 Stat. 1523)	1945 (59 Stat. 587)[3]	1958 (72 Stat. 324)[5]
1932 (47 Stat. 445)[1]	1946 (60 Stat. 533)	1958 (72 Stat. 339)[6]
1933 (47 Stat. 798)	1946 (60 Stat. 950)	1959 (73 Stat. 571)
1935 (49 Stat. 674)	1947 (61 Stat. 119)	1960 (74 Stat. 200)
1937 (50 Stat. 842)[1]	1948 (62 Stat. 285)	1960 (74 Stat. 781)
1939 (53 Stat. 1418)[1]	1948 (62 Stat. 289)	

1. These statutes did not amend the Act, but related to extension of terms of prospecting permits. No prospecting permit was extended beyond December 31, 1939.
2. Expired by its own terms on January 31, 1931.
3. Did not substantively change Mineral Leasing Act, but did operate on rights under leases issued under the Act.
4. Statute did not amend the Act, but authorized the Secretary of the Interior to accept surrender of Mineral Leasing Act leases under certain circumstances. This statute is codified as 30 U.S.C. 188a (1958).
5. Relates to Alaska Oil Proviso.
6. Act admitting Alaska as State made certain appropriate amendments because of this change of status.

B. Sections of Mineral Leasing Act of 1920 relating to oil, gas, and oil shale with notations of subsequent amendatory statutes and appropriate code sections:

SECTION 1. (30 USC 181)

1946 (60 Stat. 950)
1960 (74 Stat. 781)

SECTION 13. (30 USC 221-222h)

1935 (49 Stat. 674)

SECTION 14. (30 USC 223)

1935 (49 Stat. 674)

SECTION 15. (30 USC 224)

SECTION 16. (30 USC 225)

1946 (60 Stat. 950)

SECTION 17. (30 USC 226)

1930 (46 Stat. 1007)[1]
1931 (46 Stat. 1523)
1935 (49 Stat. 674)
1946 (60 Stat. 950)
1954 (68 Stat. 583)
1960 (74 Stat. 200)
Completely rewritten by
1960 Revision Act, infra.

SECTION 17(a). (30 USC 226)

Added: 1946 (60 Stat. 950)
Completely rewritten by
1960 Revision Act, infra.

SECTION 17(b). (30 USC 226)

Added: 1946 (60 Stat. 950)
Completely rewritten by
1960 Revision Act, infra.

SECTION 17(a), (b), (c), (d), (e), (f), (g), (h), (i), (j).

The 1960 Revision Act (74 Stat. 781) completely rewrote section 17, 17(a), and 17(b) into the above form.

SECTIONS 18-20. (30 USC 227-229)

SECTION 21. (30 USC 241)

1960 (74 Stat. 781) Amended and added to section so that it is now in form of section 21(a), (b), (c).

SECTION 22. (30 USC 251)

1958 (72 Stat. 324)

SECTION 26. (30 USC 183)

SECTION 27. (30 USC 184)

1926 (44 Stat. 373)
1930 (46 Stat. 1007)[1]
1931 (46 Stat. 1523)
1946 (60 Stat. 950)
1948 (62 Stat. 285)
1948 (62 Stat. 289, 291)[2]
1954 (68 Stat. 648)
1959 (73 Stat. 571)
Completely rewritten by
1960 Revision Act, infra.

SECTION 27(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k).

1960 Revision Act (74 Stat. 781) revised and rearranged section into above form.

B. Sections of Mineral Leasing Act of 1920 relating to oil, gas, and oil shale with notations of subsequent amendatory statutes and appropriate code sections: (continued)

SECTION 28. (30 USC 185)

1935 (49 Stat. 674)
1953 (67 Stat. 557)

SECTION 29. (30 USC 186)

SECTION 30. (30 USC187)

SECTION 30(a). (30 USC 187(a))

Added: 1946 (60 Stat. 950)
1954 (68 Stat. 583)
1960 (74 Stat. 781)

SECTION 30(b). (30 USC 187(b))

Added: 1946 (60 Stat. 950)

SECTION 31. (30 USC 188)

1946 (60 Stat. 950)
1954 (68 Stat. 583)

SECTION 32. (30 USC 189)

SECTION 33. (30 USC 190)

SECTION 34. (30 USC 182)

1960 (74 Stat. 781)

SECTION 35. (30 USC 191)

1947 (61 Stat. 119)
1950 (64 Stat. 402)
1957 (71 Stat. 282)

SECTION 36. (30 USC 192)

1946 (60 Stat. 533)
1949 (63 Stat. 682)[3]

SECTION 37. (30 USC 193)

SECTION 38. (30 USC 194)

SECTION 39. (30 USC 209)

Added: 1933 (47 Stat. 798)
1946 (60 Stat. 950)
1948 (62 Stat. 289, 291)

SECTION 42. (30 USC 226-2)

Added: 1960 (74 Stat. 781)

1. Expired by own terms January 1, 1931.
2. Provided for change in arrangement, but no change in substance.
3. When the 1946 Act (60 Stat. 533) was enacted crude oil was in short supply and it was desired to give aid to small refineries by granting them a preference right to buy U.S. royalty crdue. Because of the short supply the contracts awarded called for market price plus a premium. Subsequent to this period the availability of crude oil changed from scarcity to abundance and therefore the market price was unrealistic since crude was being bought and sold under market price. The Act of September 1, 1949, gave relief to the small refiners who were tied to Government contracts calling for market price plus a premium. No substantive change was made to section 36 by this statute.

FOOTNOTES

1. The phrase "public domain" as used here, encompasses all lands that were at any time owned by the United States and subject to sale or other transfer of ownership under the laws of the Federal government.

2. III Pound, Jurisprudence (1959), p. 429: "More than half of the states provide by statute (and elsewhere except in Louisiana the same doctrine exists by custom, coming down in older states from colonial charters, recognized by judicial decision) that the common law of England shall be the rule of decision in their courts, so far as applicable, except in so far as cases are governed by constitutions or by statutes." In the prefatory material to Cooley's edition of Blackstone's Commentaries it was written in 1870 at vi: " . . . though in England, where the common law and the statutes mentioned by this author (Blackstone) have been so greatly changed by recent legislation, new works adapted to the present condition of things may, to a considerable extent, supersede the one before us, in America where many of these changes have never been made, and where much of the recent English legislation has no importance, even by way of explanation or illustration, the original work of Blackstone is much the most useful, as presenting us the law in something near the condition in which our ancestors brought it to America, leaving us to trace in our statutes and decisions its subsequent changes here, unembarrassed by irrelevant information about parliamentary legislation which in no way concerns us."

3. III Pound, op. cit. supra note 2, at 429.

4. This concept of mineral ownership was not entirely prevalent in the Western Hemisphere. Spain in exploitation of its colonies in the Americas followed the "Regalia" theory of mineral ownership which is still prevalent in Latin America. Under the "Regalia" system, ownership of minerals contained in the subsoil is attributed to the State. See Campbell, Principles of Mineral Ownership in the Civil Law and Common Law Systems, 31 Tul. L. Rev. 303 (1957). To a very limited extent the law of England recognized a regalian right in the government. This is noted in 1 Lindley, Mines (3rd ed. 1914), sec. 3: "Briefly stated, the regalian right to mines, as recognized in England, was confined to those of the precious metals -- gold and silver. The baser substances belonged to the owner of the soil, except in certain localities where immemorial custom had modified the rule." Generally on civil law mining concepts, see 1 Lindley, Mines (3rd ed. 1914), sec. 11-14.

5. Keogh, Comment on the Federal Organic Laws, U.S.C.A. Const., p. 3.

6. Rose, Survey of National Policies on Federal Land Ownership, Sen. Doc. No. 56, 85th Cong., 1st Sess. 1 (1957).

7. Riegel, America Moves West (Rev. ed. 1949), p. 14-47. Faulkner, American Political and Social History (5th ed. 1948), p. 124-126.

8. Rose, op. cit. supra note 6, at 2: "Thus 221, 987, 787 acres of public domain resulted from the cessions of New York (1781), Virginia (1784), Massachusetts (1785), Connecticut (1786), South Carolina (1787), North Carolina (1790), and Georgia (1802)."

9. Benjamin Horace Hibbard, A History of the Public Land Policies (1924), p. 512. This reservation is consistent with the limited regalian ownership theory as was practiced in England, see note 4 supra.

10. Rose, op. cit. supra note 6, at 11. 1 Lindley, Mines (3rd ed. 1914), sec. 30, 31.

11. Rose, op. cit. supra note 6, at 2.

12. In Gibson v. Chouteau, 13 Wall. 92, 99 (1872): "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made." Also see United States v. Gratiot, 14 Pet. 538 (1840), Van Brocklin v. Tennessee, 117 U.S. 167 (1866), Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), United States v. San Francisco, 310 U.S. 16 (1940).

13. Rose, op. cit. supra note 6, at 11.

14. Ibid.

15. 2 Stat. 448 (1807). The concern over lead deposits during this period indicates the unsophisticated state of the art of war. Lead for bullets was the principal strategic material of this period.

The authority of the Congress to lease the public domain, rather than patent it was tested in United States v. Gratiot,

14 Pet. 526 (1840). The court rejected the contention that the Constitutional phrase "dispose of" vested in Congress the power only to sell, and not to lease such lands, that is the lead mines in the case considered. At page 538 the court stated:

> "This disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders; as has been so strenuously urged in the argument. The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a state; and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot clain a right to the public lands within her limits. It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States."

16. 3 Stat. 260 (1816).

17. 4 Stat. 364 (1829); 9 Stat. 37 (1846); 9 Stat. 146 (1847).

18. 1 Lindley, Mining (3rd ed. 1914), sec. 34.

19. Id. at sec. 41.

20. Henry N. Copp, United States Mineral Lands (1881), p. iii: "The motive underlying the earliest congressional legislation touching the public mineral lands was to secure a revenue therefrom. To this end the system of leasing the lead and copper mines was adopted in 1807, with its attendant agencies accountings, etc. After a trial of nearly forty years the system was pronounced a failure and in 1846 the mines were offered at sale, with a preference right in those who had leases or were in the occupation of the mines. When the gold mines of California were discovered, and the varied mineral wealth of the Pacific coast was brought to the attention of Congress, several revenue bills were introduced, at different times, and earnestly debated. But the notorious failure of the lease system in the Mississippi Valley, and the difficulties in the way of securing a revenue otherwise, gave success to the friends of free mining of 1866.

    Except in a few states, the object of congressional legislation, since 1866, has been to prevent the disposal of mineral lands to states and railroads, or in large quantities to individuals. Exploration of hidden mines is encouraged, and no efforts are used to compel miners to expend money in securing government title. The mining law of May 10, 1872, is essentially a poor man's law, and has been the source of incalculable wealth to the country, and indirectly of vast revenue to the government."

21. 30 U.S.C. 22 contains substantially the same language as the 1866 enactment.

22. 16 Stat. 217 (1870).

23. 17 Stat. 91 (1872).

24. Public land states are normally considered to be those states included in, and west of the tier of the States of Montana, Wyoming, Colorado, and New Mexico. See, Clawson and Held, The Federal Lands: Their Use and Management (1957), p. 38.

25. American Petroleum Institute, Petroleum Facts and Figures (Centennial ed. 1959), p. 1. Although the Drake well is normally proclaimed as the birthplace of the oil industry in the United States, see Frank J. Taylor and Earl M. Welty, The Black Bonanza (1958), p. 1: " . . . several years before the Drake Well was drilled, two enterprising Spanish Californians, Andreas and Romulo Pico, were gathering 'brea', as they called the sticky tar seeping into pits they dug in Southern California, and cooking the stuff at San Fernando Mission to boil off lamp oil and make axle grease. And by 1857, two years prior to the Drake discovery, George S. Gilbert, a whale-oil merchant, had already consigned to New York a hundred kegs of lamp oil he had extracted in a still near Ventura Mission from heavy tar seeping out of a nearby mountain.

Decades before this, the Indians and the early French explorers had collected 'rock oil' floating on Pennsylvania's Oil Creek to make medicines. For a century or more the California Indians had gathered 'chapapote' to calk canoes, to waterproof baskets, and to fasten arrowheads to shafts. So if it is anybody's good guess where and when the oil golconda was born."

26. Gird v. California Oil Co., 60 Fed. 531, 532 (C.C.S.D. Cal. 1894): "The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."

27. Ex parte Union Oil Co., 23 L.D. 222 (1896). This was a reversal of an earlier position of the Interior Department which allowed location of petroleum lands under the placer laws, see 1 L.D. 560.

28. American Petroleum Institute, op. cit. supra note 25, at 40, 41.

29. Hearings before House Committee on the Public Lands on H.R. 24070 (To Authorize the President of the United States to make Withdrawals of Public Lands in Certain Cases), 61st Cong., 2d Sess. (May 13, 17, 1910), p. 91.

30. Id. at 140.

31. Act of June 25, 1910, c. 421, 36 Stat. 847, 43 U.S.C. 141.

32. Indicative of the continuing interest of the Congress to arrive at a procedure to open up the withdrawn oil lands are the following bills which were introduced, and upon which hearings were held: S. 5434, 63rd Cong., 2d Sess. (lease), S. 4898, 63rd Cong., 2d Sess. (patent); H.R. 14094, 63rd Cong. 2d Sess. (patent), H.R. 406, 64th Cong., 1st Sess. (lease), S. 45, 65th Cong., 1st Sess. (patent), H.R. 3232, 65th Cong., 2d Sess. (lease), and S. 2812, 65th Cong., 2d Sess. (lease). The Mineral Leasing Act of 1920 was passed during the 66th Cong., 2d Sess. The parenthetical word "lease" or "patent" indicates the type of right which would have been granted discoverers under the bills.

33. See Appendix A, p. 2, 3 for a summary of the placer mining laws applicable to petroleum locations.

34. Atty. Gen. of the United States, Supplement to the Annual Report, Upon the Litigation over Withdrawn Oil Lands of the United States (1915), p. 6: "Under the mining law, an individual or corporation, sufficiently financed, might occupy and operate any number of tracts of public oil land without any restraint upon the quantities of oil produced or the methods of production, and without rendering to the General Government anything in return. Successful operations, under favorable conditions were known to be productive of large profits. Add to this the fact that the oil in one tract is often subject to be partly drained off through wells operated upon another, and the incentives to speculative occupation, negligent and wasteful operation, and excessive production, become obvious." and at p. 10: "I am informed that the waste of oil after extraction and the irreparable damage done to the subterranean deposits due to negligent operation and consequent intrusion of water are very serious. In certain instances the operators seem to have been actuated only by the desire to reap the greatest profit possible before the Government could enforce its rights."

35. Hearings before Senate Committee on the Public Lands on H.R. 406, 64th Cong., 1st Sess. (Feb. 2, 1916), pp. 15, 16:
"A placer miner's essential equipment is a shovel and a pan. When the oil prospector strikes oil--that is, makes

his discovery--he has ordinarily spent many times more than $500. He has nothing more to do to entitle him to patent. Finding oil he gets title to 20 acres. If seven associates go in with him, they may take 160 acres. Then the ground about the scene of feverish activity. Some rich and powerful adventurer or a flock of such sink on the adjacent ground, and reaching oil sands proceed by means of pumps of great power to empty his claim and the whole pool, the existence of which was revealed by his genius and his enterprise. Even while he is going down he is at the risk of finding himself in a race with a competitor lured to the region by the promise his labors have excited. It is not the man who first begins, but the man who first gets oil who takes the ground. What chance has the ordinary man in such a race with Standard Oil? Rivalry of that character naturally breeds hatreds that lead to bloodshed and breaches of the peace."

This is part of a statement by Senator Thomas J. Walsh of Montana.

36. Apparently the common practice on the public lands was to send out a crew of eight people who would locate a great number of claims. (See, Hearings before Senate Subcommittee of the Committee on Public Lands on S. 5434 (A Bill for Leasing of Oil and Gas Lands Withdrawn from Entry), 63rd Cong., 2d Sess. (May 21, 1914), pp. 6, 14.) After the location was made the 8 locators would assign their 8 separate 20 acre locations to a corporation--all this before any discovery was made. To protect bona fide purchasers of rights so conceived Congress passed the Act of March 2, 1911, 36 Stat. 1015 (See Appendix A, p. 4).

37. Atty. Gen. of the United States, op. cit. note 34, Appendix B, in a letter to Scott Ferris, Chairman of the Committee on Public Lands from T. W. Gregory, Attorney General. The letter states in part:

"I am reliably informed that practically all of the known oil areas in California have been covered by paper locations--many parts of them again and again--at one time or another . . . Those parties whom we have sued and those whom we contemplate suing are those who appear to have no right or equity either under the mining law or the Pickett Act of June 25, 1910, but who have entered on the withdrawn land in spite of the withdrawal and in spite of the known purpose of the Government to enforce it, and who in many instances have taken enormous quantities of oil and appropriated proceeds--millions of dollars--without making any provision to indemnify the Government, besides inflicting grave damage to the oil deposits through hasty and

negligent operation. Some of these parties acted in pursuance of plans which were inchoate or half abandoned when the withdrawal occurred. In other cases the plans were carried out through the practical expulsion of earlier claimants. In some the claims are now sought to be supported by fraudulent dummy locations and fraudulent locations of gypsum."

38. See, John Ise, The United States Oil Policy (1926), Ch. XXIII The Public Oil Lands: Discussions in Congress.

39. Id. at 329.

40. Id. at 330.

41. Clawson and Held, op. cit. supra note 24, at 26, 27:

"Concern grew throughout the nineteenth century that the land disposal practices were not working as well as had been hoped. Even earlier many leaders had deplored the cycle of clearing land, cultivating it until it was exhausted, abandoning it, and moving, usually westward, to clear new land. But the process had been on a relatively small scale until the nineteenth century. Then vast areas of lands were cleared, forests were cut in ways not conducive to their regrowth, fire was rampant in the woods, and the plains began to be plowed in areas where they should not have been. The census of 1880, which first obtained information on farm tenancy, shocked the nation by showing that the ideal of the independent landowner tilling the soil he owned had not been achieved to the extent that had been fondly hoped. One-fourth of all farmers were tenants, even in this period of generally free public domain."

For a detailed discussion of the wasteful practices employed in the recovery of oil and gas see Ise, op. cit. supra note 38, Ch. XIV-XVII. Ise summarized the situation in the following language at p. 274:

". . . the results of private ownership and exploitation of oil were almost everywhere the same: instability in the industry, over-production, wide fluctuations in prices, with prices always far too low; curtailment campaigns carried on in a generally vain effort to secure stability and reasonable prices; waste of oil by the millions of barrels; waste of capital by hundreds of millions of dollars; waste of human energy; speculation, and fraud, and extravagance, and social inequality; and finally, the development of monopoly conditions as the only means of escape from the intolerable conditions of private competition."

42. American Petroleum Institute, Quarterly (Centennial Issue 1959), Allan Nevins, Three Fabulous Decades, p. 23:

". . . the British Navy steamed to its stations in 1914 with oil burning engines and Joffre repulsed the Germans on the Marne with the aid of troops which General Galieni hurried from Paris in taxicabs, trucks, and private cars. Gasoline enabled airplanes to take to the skies. Tanks soon tore through the German lines with the same fuel. Diesel-powered ships and lorries carried troops and stores. When in April, 1915, the Cushing field (Oklahoma) reached a maximum production of 300,000 barrels of oil daily--more than a third of the nation's output--the Allies had reason to rejoice and the Germans to show concern."

43. Note 34, supra.

44. Del Monte Mining Co. v. Last Chance Mining Co., 117 U.S. 55, 60 (1897): "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the States and Territories of the United States, and, in the absence of specific statutory authority provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface." and at p. 61: "In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their 'public lands'. By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the Government."

45. Hearings before the Senate Committee on Public Lands on H.R. 406 (Leasing of Oil Lands), 64th Cong., 1st Sess. (Feb. 2, 1916), p. 23.

46. Ise, op. cit. supra note 38, at 334-337.

47. The reason for the original withdrawal of the public oil lands from entry was in large measure the concern for a stockpile of petroleum for national defense purposes. Acting in furtherance of this concern Presidents Taft and Wilson withdrew four naval petroleum reserves from the public oil lands in 1912 (Elk Hills-Naval Petroleum 2), 1914 (Teapot Dome--Naval Petroleum Reserve No. 3), and 1924 (Naval Petroleum Reserve No. 4 which includes 35,000 square miles on the northern tip of Alaska just south of Point Barrow). See Sen. Doc. No. 187, 78th Cong., 2d Sess. (1944), History of Naval Petroleum Reserves, pp. 2, 3.

48. 236 U.S. 459 (1915).

49. Ise, op. cit. supra note 38, at 332-334.

50. Act of February 25, 1920, 41 Stat. 437.

51. Id. at sections 18, 18a, and 19.

52. Id. at section 13.

53. Id. at section 14.

54. Id. at section 14.

55. Id. at section 17.

56. Id. at section 16.

57. Id. at section 17.

58. Id. at section 16.

59. Id. at section 27.

60. Ise, op. cit. supra note 38, at 352 states:

"During the consideration of the bill, scouts and geologists had studied the promising areas of reserved lands; and even before the bill was signed claimants were camped within striking distance of the reserves like 'crows on a fence'. It is said that some oil prospectors had aeroplanes placed at the telegraph stations, awaiting the word of the approval of the legislation, to carry the news to waiting representatives near where claims had been spotted. Applications under the act began to come in by telegraph on the day it was signed. In some sections, particularly in Wyoming and Montana, important and unexpected discoveries were made just about the time of the passage of the act, and the entire areas for many miles around these discoveries were plastered with applications."

61. Hardwicke, The Rule of Capture and Its Implications as Applied to Oil and Gas, 13 Tex. L. Rev. 391 (1935).

62. This is a quotation from a letter dated August 11, 1924 from Mr. Henry L. Doherty to the President of the United States; the letter is set out in Terrill, Unit Agreements and Unitized Operations: A Review of Their Past and Some Speculations as to Their Future: With Particular Comments on Federal Unit Agreements, First Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, (1949), p. 4.

63. Generally on this subject see Terrill, op. cit. supra note 61, Murphy, Conservation of Oil and Gas, A Legal History, 1948, Ch. 44, American Bar Association, Legal History of Conservation of Oil and Gas (1938), and Report of the Attorney General Pursuant to Section 2 of the Joint Resolution of July 28, 1955, Consenting to an Interstate Compact to Conserve Oil and Gas (1956).

64. Report of the Attorney General, op. cit. supra note 63, at 30. Terrill, op, cit. supra note 62, at 10, 11 differs in the date of the first state wide proration order: " . . . although orders had been promulgated in Oklahoma prior to 1930 for the purpose of regulating production in specific fields, state wide regulation of oil first began with the order of the Oklahoma Corporation Commission of June 30, 1930, and the first state wide order was issued by the Railroad Commission of Texas on August 13, 1930, the purpose of each order being designed substantially to curtail total production in each state and to allocate the allowable production as between fields and among the properties or wells in each field."

65. Thompson, Fifteen Years of Accomplishments of the Interstate Oil Compact Commission, 9 Interstate Oil Compact Quarterly Bulletin (Dec. 1950) describes the difficulties resulting from East Texas production during this period: "The enormous quantity of oil that was being produced paralyzed oil development, because the East Texas Crude posted price dropped to 10 cents per barrel, and much oil was selling for a nickel a barrel .... The Texas Railroad Commission repeatedly issued orders attempting to reduce the allowable production of the East Texas Field, but these orders were stricken down in the Federal courts time and time again on the theory that the Commission was attempting to limit production to market demand, when such was not permitted by our statute.... The Governor of Texas called out the National Guard and sent them into this field to close the field down, and for a time the field was under martial law. But the Supreme Court of the United States in the case of Constantin Versus Sterling, decided that the Governor had exceeded his authority and that martial law was not legal....and in 1932 the Legislature of Texas passed the market demand statute which says that production of oil in excess of market demand is waste.... Under this law we were able to get a valid proration order upheld by the Federal Courts, and by the State courts. And order was again restored, and the price of oil moved back up to 75 cents a barrel."

66. Report of the Attorney General, op. cit supra note 63, at 35, 36.

67. See Murphy, op. cit. supra note 63, at Ch. 39, for a description of the manner the Compact is implemented.

68. This is an excerpt from a report of the Federal Oil Conservation Board which is set out in Terrill, op. cit. supra note 62, at 6.

69. Terrill, op. cit.supra note 62, at 3.

70. Act of February 25, 1920, 41 Stat. 437, sec. 27 provided: "That if any of the lands . . . leased . . . shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of . . . or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of . . . oil, oil shale, gas . . . the lease thereof shall be forfeited by appropriate court proceedings." Although it might be argued that this provision did not prohibit unit type agreements, the issue is questionable.

71. Terrill, op. cit. supra note 62, at 4.

72. Murphy, op. cit. supra note 63, at 603. The authority of the Secretary of the Interior to refuse issuance of new prospecting permits was upheld in United States v. Wilbur, 283 U.S. 414 (1931).

73. 53 I.D. 640, 641 (1932).

74. Report of the Attorney General, op. cit. supra note 63, at 32.

75. Murphy, op. cit. supra note 63, at 603.

76. 46 Stat. 1007 (1930).

77. 55 I.D. 547, 559 (1936) quotes the Director, United States Geological Survey as evaluating the Kettleman Hills unit operation as follows: " . . . Records indicate that at this time there are approximately 236 wells in the North Dome field, and it is believed safe to say that there would have been ten times as many wells drilled, possibly more, had not the unit plan been operative."

78. 46 Stat. 1523 (1931).

79. See Appendix A for a more detailed summary of the Act provisions.

80. 53 I.D. 640, (1932). Other stipulations required of permittees are set out at p. 642: "(d) Operating methods: The applicant agrees to conform to regulations of the Secretary . . . as to location and spacing of wells, time and method of drilling . . . and production program . . . (e) . . . The applicant agrees to comply with all State and Federal laws, regulations and orders and to conform to any allowance of production fixed for the field, pool or area by the State . . . "

81. Act of August 21, 1935, 49 Stat. 674.

82. 30 U.S.C. 226(j) (Supp. III 1959-61).

83. 56 I.D. 174 (1937). Hearings before a Special Senate Committee Investigating Petorleum Resources pursuant to S. Res. 36, 79th Cong., 1st Sess. (1945), p. 8: "The United States Geological Survey . . . estimated that as of January 1, 1922, the reserves of oil recoverable by methods then in use detailed 9,150,000,000 barrels . . . These reserves, the report added, were---'enough to justify the present requirements of the United States for only 20 years of the oil could be taken out of the ground as fast as it is wanted.' The Geological Survey asserted that the United States was---'already absolutely dependent on foreign countries to eke out her own production and, if the foreign oil can be produced this dependence is sure to grow greater and greater as our own fields wane'."

84. Id. at 178.

85. Hearings before Senate Committee on Public Lands and Surveys on S. 1772 (Promotion of Mining on the Public Domain), 74th Cong., 1st Sess. (1935), p. 6.

86. Act of August 21, 1935, 49 Stat. 674, section 1. See Appendix A, pp. 11-14.

87. Note 85, supra.

88. Note 86, supra.

89. Note 85, supra at 7.

90. Note 86, supra.

91. 30 U.S.C. 226(c) (Supp. III 1959-61).

92. United States Department of Interior, Bureau of Land Management, Offer to Lease and Lease for Oil and Gas, sec. 2(r).

93. 30 U.S.C. 226(j) (Supp. III 1959-61).

94. Ibid.

95. Act of February 25, 1920, 41 Stat. 437, sec. 32.

96. 55 I.D. 502, 515 (1935).

97. Note 92, supra at sec. 4.

98. Sen. Rep. No. 1392, 79th Cong., 2d Sess. (1946).

99. Id. at 1.

100. 54 Stat. 742 (1940).

101. 56 Stat. 726 (1942).

102. 56 Stat. 1080 (1942).

103. Act of August 8, 1946; 60 Stat. 951. See Appendix A for detailed summary of the Act.

104. This was the first time since the 1920 enactment that the Congress has specified a flat royalty --- in the Act of February 25, 1920 a flat 5% royalty was specified for leases issued after discovery under a prospecting permit, however, all other leases under the original Act and amendments thereto had provided for royalties of not less than 12.5%. The Secretary of the Interior had acted in his discretion and established a sliding scale royalty rate on Federal leases. The royalty provision would provide for a 12.5% royalty on certain average production, however, it would provide for increased royalty as the average production increased. For example see leasing regulations set out in 47 L.D. 437 (regarding 1920 Act), 51 L.D. 597 (regarding 1931 Amendments), 55 I.D. 502 (regarding 1935 Amendments).

105. Sen Rep. No. 1392, op. cit. supra note 98, at 6.

106. 51 L.D. 241 (1925); 52 L.D. 359 (1928); 54 I.D. 371, 373 (1934). Interior had not excluded all types of contractual arrangements from the purview of acreage limitations, see 59 I.D. 4 (1945).

107. Act of August 7, 1947, 61 Stat. 913.

108. Id. at Sec. 3.

109. Special Committee Investigating Petroleum Resources pursuant to S. Res. 253, 79th Cong., as extended by S. Res. 36, 79th Cong.

110. For example see testimony of J. Edgar Pew, Vice President, Sun Oil Co., Hearings before Special Committee Investigating Petroleum Resources pursuant to S. Res 36, 79th Cong., 1st Sess., June 19, 1945, p. 4 et seq.

111. Sen. Rep. No. 9, 80th Cong., 1st Sess., 16, 17 (1947).

112. Id. at 49.

113. Note 107, supra at Sec. 6.

114. 68 Stat. 583 (1954). See Appendix A for detailed summary of this Act.

115. Oil Facts, Vol. 3, No. 2, April-May 1961, reports on the third Joint Association Survey of Industry Drilling Costs and states in part:

"An estimated 49,563 oil and gas wells were drilled in the U.S. during 1959. Of these, 19,101 were non-productive 'dusters.'

Domestic oil producers expended $2,651,096,000 just for drilling and equipping these wells, losing $820,775,000 of this in dry holes.

Though the proportion of dry holes remained consistent with past years at about 38 percent, and overall drilling activity was slightly down from preceding years, average drilling costs rose because the industry was forced to drill deeper and deeper in the search for new supplies.

* * * * * *

Total wells drilled dropped 13 percent from 1956, but total expenditures were down only 7½ percent from the 1956 record levels. . .

In 1959 a gas well cost an average of $101,000 to drill; an oil well, $52,000. A dry hole averaged $43,000 down the drain . . .

Drilling costs rise steeply as wells go into the deeper ranges, where more and more drilling is being concentrated. For example, in productive wells of the 7500-10,000 foot depth range, it costs an average of $27.48 for each additional foot drilled.

In wells of over 15,000 depth, however, it costs $101.50 for each additional foot drilled."

116. 68 Stat. 583 (1954).

117. 74 Stat. 781 (1960).

118. Hearings before Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 86th Congress, 1st Sess., June 5, July 14 and 15, 1959.

119. Sen. Rep. No. 1549, 86th Cong., 2d Sess. (1960). 1960 USC Cong. and Admin. News 3314, 3315.

120. 30 USC 181 (1958).

121. Sen. Rep. No. 1549, 86th Cong., 2d Sess. (1960). 1960 USC Cong., and Admin. News 3321.

122. Schurr et al., Energy in the American Economy 1850 - 1975 Its History and Prospects, Table 22, p. 86.

123. Ibid.

124. Id. at Figure 34, p. 237.

125. 40 Op. Atty. Gen. 9 (1941).

126. 30 USC 181 (1958) and 30 USC 352 (1958).

127. 30 USC 352 (1958).

128. 60 Stat. 951 (1946).

129. Act of Feb. 29, 1958, 72 Stat. 28, 43 USC 155 et seq. (1958) provides that minerals in withdrawn or reserved public lands for use of the Department of Defense shall generally be under the jurisdiction of the Secretary of the Interior for disposition or exploration; provided the Secretary of Defense determines such disposition or exploration is not inconsistent with the military use of the lands.

130. 40 Op. Atty. Gen. 9 (1941) and 40 Op. Atty. Gen. 41 (1941).

131. Act of Aug. 7, 1953, c. 345, 67 Stat. 462, 43 USC 1331 et seq. (1958).

132. Act of May 22, 1953, c. 65, 67 Stat. 29, 43 USC 1301 et seq. (1958).

133. Generally, see Bartley, The Tidelands Oil Controversy, University of Texas Press (1953). Although the ownership of the seaward lands has been decided as residing in the United States by the Supreme Court, see U.S. v. California, 332 U.S. 19 (1947), U.S. v. Texas, 339 U.S. 707 (1950), U.S. v. Louisiana, 339 U.S. 699 (1950), at the time of the enactment of these Acts, the issue being hotly disputed, as it still is today, was where is the coast line.

134. See Campbell, International Law Developments Concerning National Claims To and In Offshore Areas, 33 Tul. L. Rev. 339 (1959).

135. Act of Aug. 13, 1954, c. 730, 68 Stat. 708, 30 USC 521 et seq. (1958).

136. Sen. Rep. No. 1610, 83rd Congress., 2d Sess., 1954; 1954 USC Cong. and Admin. News 3027. Under the Mineral Leasing Act a lease was invalid insofar as it covered lands embraced in a valid patented or unpatented mining claim (48 L.D. 5 (1921)); mining claims could not be located on lands for which a lease application had been filed (58 L.D. 426 (1943)).

137. 30 USC 189 (1958).

138. Hodgson v. Midwest Oil Co., 297 F 273 (D.C. Wye., 1924), case transferred to CCA, 1925, 269 U.S. 534.

139. Sheridan-Wyoming Coal Co. v. Krug, 172 F2d 282, (C.A., D.C., 1949) reversed on other grounds 338 U.S. 621.

140. 30 CFR Part 221.

141. 284 F2d 649 (C.A., 10, 1960) cert. den. 366 U.S. 936.

142. Id. at 655.

143. 226 F2d 35 (D.C. Cir. 1955).

144. Id. at 46.

145. Id. at 47.

146. In Fenelon Boesche, Administrator, v. Udall, 303 F2d 204, (D.C. Cir. 1961), cert. granted 371 U.S. 886.

147. 284 F2d 657 (10th Cir. 1960).

148. Brief for Appellee, D.C. Cir. No. 16,238, Boesche, Appellant v. Udall, Appelle, at 16, 17.

149. 73 Stat. 571; 30 USC 184(h)(2) (Supp. III 1959-61).

150. Standard Oil Company of New Jersey v. U.S., 221 U.S. 1 (1911).

151. Sec. 27, Mineral Leasing Act of 1920; 30 USC 184 (Supp. III 1959-61).

152. Sec. 17, Mineral Leasing Act of 1920.

153. Sec. 35, Mineral Leasing Act of 1920; 30 USC 191 (1958).

PART TWO FOOTNOTES

1. Malone, Oil and Gas Leases on United States Government Lands, Second Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, Dallas, Texas, (1951), pp. 338, 339.

2. Third Report of the Attorney General, Pursuant to Section 2 of the Joint Resolution of July 28, 1955, Consenting to an Interstate Compact to Conserve Oil and Gas, (1958), pp. 32, 33.

3. The text in stating the power of the Secretary of the Interior to limit public land production to market demand independent of State action referred to the Federal Oil and Gas Operating Regulations, which provide in 30 CFR 221.35 (1949 Ed.) as follows: ". . . The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil." It may be safely stated that the legal question will not be determined by operating regulations issued by an administrative agency.

4. Black's Law Dictionary, 4th Ed., p. 1045.

5. Id. at 991.

6. 318 U.S. 261 (1943).

7. 318 U.S. 285, reh. den., 318 U.S. 801 (1943).

8. The dissent of Mr. Justice Fxankfurther which appears id. at pp. 296-303 may be summarized by the following excerpts:
At p. 298: "The power given to Congress by Article I, Sec. 8 of the Constitution, to 'exercise Legislation' over federal enclaves is not so tyrannical as to preclude in law what good sense requires."
At p. 300: "If Congress speaks, state power is of course determined by what Congress says . . . But short of such Congressional assertion of overriding authority, the phrase 'exclusive jurisdiction' more often confounds than solves problems due to our federal system."
The Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Part II (1956), at p. 176 interprets the dissent in this case as showing a disposition of the court minority to regard exclusive legislative jurisdiction as not constituting a barrier to the application of State law absent an expression by Congress that such barrier shall exist. With regard to such disposition the Report states: "Such a view constitutes, it seems clear, a sharp departure from overwhelming

precedent, and serves to blur the historical legal distinctions between areas of exclusive legislative jurisdiction and areas in which the Federal Government has only a proprietorial interest."

9. Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction (1957), p. 169.

10. Id. at 176.

11. Act of Feb. 25, 1920, c. 85, 41 Stat. 437, 30 USC 181 et seq. (1958).

12. Act of Aug. 7, 1947, c. 513, 61 Stat. 913, 30 USC 351 et seq. (1958).

13. Section 1 of the Mineral Leasing Act of 1920, supra note 11, as amended, 30 USC 181 (Supp. II 1958), pertains to ". . . lands . . . owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves . . ."
Section 3 of the Mineral Leasing Act for Acquired Lands of 1947, supra note 12, 30 USC 352 (1958), provides: "Except where lands have been acquired by the United States for the development of the mineral deposits . . . all deposits of . . . oil, oil shale, gas . . . which are owned or may hereafter be acquired by the United States . . . (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks or monuments, (b) set apart for military or naval purposes, or (c) tidelands or submerged lands) may be leased . . . Provided, That nothing in this chapter is intended . . . to apply to . . . the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America."

14. Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, Part I, The Facts and Committee Recommendations (1956), pp. 13, 14.

15. Note 7, supra.

16. Note 9, supra at 146: "The civil authority of a State is extinguished over privately owned areas and privately operated areas to the same extent as over federally owned and operated areas when such areas are placed under the exclusive legislative jurisdiction of the United States."

17. Note 9, supra at 188, 189: "State reservations of jurisdiction have presented few legal problems. In no instance has a State reservation of jurisdiction been invalidated, or its scope narrowed, on the ground that its effect was to enlarge the power of the State or to interfere with the functions of the Federal Government. Instead, the reported cases involving such reservations have presented questions concerning the scope of the reservations actually made. Thus, in Collins v. Yosemite Park Co., 304 U.S. 518 (1938), it was held that a reservation by a State of the right to tax the sale of liquor does not include the right to enforce the regulatory features of the State's alchholic beverage control act in an area in which, inter alia the right to tax, the entire jurisdiction of the State had been ceded to the Federal Government. Similarly, in Birmingham v. Thompson, 200 F. 2d 505 (C.A. 5, 1952), it was held that even though the State, in ceding jurisdiction to the Federal Government, reserved the right to tax persons in the area over which jurisdiction had been ceded, a city could not require the payment of a license fee by a contractor operating in the area where issuance of the license was coupled with a variety of regulatory provisions. The results reached in these two cases suggest that State statutes transferring jurisdiction will be construed strictly. Only those matters expressly mentioned as reserved will remain subject to the jurisdiction of the State."

18. Note 14, supra at 123.

19. Table I, ibid, tabulates the amount of real property held country-wide by Federal agencies and its legislative jurisdictional status. The following totals, rounded off to the nearest hundred thousand, reflects the total acreage held in each of the categories of legislative jurisdiction:

Exclusive:	6,400,000 acres
Partial:	12,300,000 acres
Concurrent:	400,000 acres
Proprietorial:	384,200,000 acres

An examination of the tabulation also shows that the majority of the land under exclusive legislative jurisdiction falls within categories of land upon which little or no leasing takes place, that is, national parks and military enclaves.

20. Note 11, supra.

21. 225 La. 379, 73 So. 2d 180 (1954).

22. United States Department of the Interior, Bureau of Land Management, Offer to Lease and Lease for Oil and Gas, Form No. 4-1158, 6th Ed. (April 1957), Sec. 2(k) provides in part:

"Taxes and wages, freedom of purchase.--To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property, or assets of the lessee . . ."

23. 348 U.S. 831 (1954).

24. 234 F. 2d 898 (C.A., 5, 1956).

25. Id. at 902.

26. Id. at 902.

27. 352 U.S. 916 (1956).

28. Act of Aug. 7, 1953, c. 345, 67 Stat. 462, 43 USC 1331 et seq. (1958).

29. Act of May 22, 1953, c. 65, 67 Stat. 29, 43 USC 1301 et seq. (1958).

30. Id. at 43 USC 1301.

31. For a review of the manner and conditions under which the United States asserted jurisdiction see Holland, The Juridical Status of the Continental Shelf, 30 Tex. L. Rev. 586, 589-590 (1952).

32. Note 28, supra at 43 USC 1332, which provides in part "(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . ."

33. 332 U.S. 19 (1947).

34. Id. at 45.

35. 339 U.S. 699, 705 (1950).

36. Note 33, supra at 38, 39.

37. United States v. California, 332 U.S. 19 (1947).
United States v. Texas, 339 U.S. 707 (1950).
United States v. Louisiana, 339 U.S. 699 (1950).

38. Note 7, supra.

39. 43 USC 1331 (1958).

40. See 34 Op. Atty. Gen. 171, 177 (1924).

41. McLane, Oil and Gas Leasing on Indian Lands (1955), p. 106.

42. 6 Peters 515 (1832).

43. Id. at 557.

44. Id. at 561.

45. McLane, Op. cit. supra note 41, discusses the matter of Indian Tribes as States at pp. 20-22.

46. An article in Time Magazine, Nov. 10, 1958, p. 31, on the Navajo Indians reports one possible area of judicial determination. It states that the Navajos have "bluntly told the State of Utah (the richest oil-producing Navajo land lies in Utah) that they do not recognize the authority of the Utah Oil and Gas Conservation Commission in actions dealing with Navajo land."

47. Note 9, supra at 45, 46.

48. U.S. Const., Art. IV, sec. 3, cl. 2.

49. 63 So. 2d 115 (Miss. Sup. Ct. 1953).

50. Id. at 125.

51. Id. at 125.

52. 73 F. Supp. 225, 234 (S.D. Calif. 1946).

53. The extent to which the States can go within Constitutional limits to regulate and control the drilling for, and production of, oil and gas from private lands for the purposes of conservation both in the interest of the public and for the protection of the correlative rights of the individual owners is virtually unlimited so long as the State does not act unreasonably or arbitrarily. See Williams, Conservation and the Constitution, 6 Okla. L. Rev. 155 (1953). The usual grounds for attack has been the Due Process and Equal Protection clauses of the Constitution. The Supreme Court in Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 185 (1950) said: "The Due Process and Equal Protection issues raised . . . are virtually without substance. It is now undeniable that a State may adopt reasonable

regulations to prevent economic and physical waste of natural gas. This Court has upheld numerous kinds of State legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, . . . or to protect the economy of the State. . . . These ends have been held to justify control over production even though the uses to which property may profitably be put are restricted. . ."

54. These provisions are in substance found in Offer to Lease and Lease for Oil and Gas, United States Department of Interior, Bureau of Land Management, Form No. 4-1158, Sixth Edition (April 1957).

55. Id. at Sec. 2 (b).

56. Id. at Sec. 2 (c).

57. Id. at Sec. 2 (j). The Oil and Gas Operating Regulations referred to are promulgated in 30 CFR 221 (1949 Ed.).

58. Id. at Sec. 4.

59. U.S. Const., Art. I, sec. 8, cl. 3.

60. Act of June 21, 1938, c. 556, 52 Stat. 821, 15 USC 717-717w (1958).

61. The decision of the Supreme Court of Kansas is reported in 180 Kan. 454, 304 P. 2d 528 (1956). The per curiam opinion of the United States Supreme Court reversing the State court is reported in 355 U.S. 391 (1958).

62. U.S. Const., Art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

63. U.S. Const., Art. IV, sec. 3, cl. 2.

64. 3 How. 212 (1845).

65. 246 U.S. 343 (1918).

66. Id. at 346.

67. 13 Wall. 92, 99 (1872).

68. 310 U.S. 16 (1940).

69. Id. at 29, 30.

70. Note 11, supra.

71. Note 12, supra.

72. Note 12, supra at 30 USC 359 (1958).

73. Note 12, supra. Codified as 30 USC 357 (1958).

74. Note 2, supra at 32.

75. Act of Feb. 22, 1935, c. 18, 49 Stat. 30, 15 USC 715-715m (1958).

76. Id. at 15 USC 715b (1958).

77. Id. at 15 USC 715a (1958).

78. 268 U.S. 45 (1925).

79. Note 11, supra. Codified at 30 USC 189 (1958).

80. Note 78, supra at 48, 49.

81. Note 65, supra at 346.

1. The estimated recoverable shale oil in place in the Piceance Basin, if only the richer 25 gallons per ton shale deposits are considered, is 400 billions of barrels. If shales of 15 gallons per ton are considered the estimate is 1 trillion barrels. Duncan, Oil Shale Deposits in the United States, The Independent Petroleum Association of America Monthly, Vol. 29, No. 4, Aug. 1958, p. 22 at p. 50. These estimates do not consider that certain losses will occur in mining and processing the deposits. Recent world crude oil reserve estimates are circa 301 billion barrels. Oil and Gas Journal, Vol. 58, No. 52, Dec. 26, 1960, pp. 98, 99. The American Gas Association, American Petroleum Institute, and Canadian Petroleum Association, Reports on Proved Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada, Dec. 31, 1960, estimates the crude oil reserves of the United States as 31.61 billion barrels. This estimate of crude oil reserves includes only oil recoverable under existing economic and operating conditions. United States crude oil production in 1960 was 2.47 billion barrels.

2. Oil shale occurs in at least 29 States and the total United States reserves in place is estimated to be 1.15 trillion barrels. Bureau of Mines, Bull. 585, Mineral Facts and Problems, 1960 Ed., Chapter on Oil Shale.

3. The Atomic Energy Commission reports that world fossil-fuel consumption in the year 2000 will be over five times consumption in 1958, and that domestic consumption within the United States will be over four times as great in 2000 as it was in 1958. ABC, Office of Technical Information, Fossil Fuels in the Future, TID-8209, Oct. 1960, p. 1. This study states at pp. 1, 2:

> "The United States currently uses about 75 per cent of its fossil fuels in fluid form. About 10 per cent of the fluid-fuel total is now imported. If the United States should cease to import fuels in the near future, domestic fluid-fuel resources could supply domestic requirements for fluid fuels in the 1970's. Before 1980 it would become necessary to produce large amounts of shale oil to help meet fluid-fuel requirements. Together, shale oil and fluid hydrocarbons could meet domestic requirements for fluid fuels for the remainder of the century although the cost would be somewhat higher than if some petroleum fuels were imported."

4. Report to the Congress (Hoover Commission), Commission on Organization of the Executive Branch of the Government, Business Enterprises, May 1955, p. 70.

5. Sec. 37, 41 Stat. 451 (1920), 30 USC 193 (1958).

6. Ely, Conservation of Oil and Gas (1948-1958), p. 302. Secretary of the Interior Ickes is quoted in Sen. Rep. No. 1792, 76th Cong., 3rd Sess. 2 (1940) as follows:

> "Since the recording of such mining locations was entrusted to the control of the miners of each mining district in conformity with local law, and since no complete examination of these records has ever been made, accurate figures as to the number and extent of such claims are not available. However, an examination was made by the General Land Office in the years between 1920 and 1930 to determine the status of the oil-shale placer-mining claims on and about the Green River shale formation in Colorado, Wyoming, and Utah. That examination disclosed that more than 30,000 such claims,

embracing more than 4,000,000 acres of the public domain, were not being maintained by the performance of annual assessment work."

7. Montgomery, The White Rock that Burns, Our Public Lands, Bureau of Land Management, Vol. 10, No. 4, April 1961, p. 7.

8. The heavy reliance on petroleum products in World War I led to the oft quoted statement by Lord Curzon that "The Allies floated to victory on a sea of oil."

9. See note 7 supra.

10. There was active interest in oil shale during the 1916-1923 period on limited areas of the oil shale deposits. Winchester, Oil Shale of the Rocky Mountain Region, Bull. 729, U. S. Geological Survey, 1923, pp. 72-76.

11. See note 5 supra. Sec. 21 of the Act (30 USC 241 (1958)) authorizes issuance of oil shale leases.

12. Exec. Order 5327, Apr. 15, 1930.

13. Ely, op. cit. supra note 6, at 302. The rules governing the issuance of oil shale leases are set out in 43 Code Fed. Regs. Part 197 (Rev. 1954).

14. The Petroleum Placer Act, 29 Stat. 526 (1897), provided:

> " . . . That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Placer mining claims were made "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." Rev. Stat. Sec. 2329 (1895), 30 USC 35 (1958). Apposite

provisions for vein or lode claims required discovery (Rev. Stat. Sec. 2320 (1875), 30 USC 23 (1958)), marking of location (Rev. Stat. Sec. 2324 (1875), 30 USC 28 (1958)), and annual labor of $100 (Rev. Stat. Sec. 2324 (1875), 30 USC 28 (1958)).

15. Rev. Stat. Sec. 2325 (1875), 30 USC (1958).

16. 280 U.S. 306 (1930).

17. Id. at 316, 317.

18. Id. at 315: "No relocation of the claim was ever attempted, nor was the valid existence or maintenance of the claim ever challenged in anyway by the United States, or by anyone prior to [application for patent]."

19. Ely, Conservation of Oil and Gas, A Legal History, 1948, p. 606.

20. 295 U.S. 639 (1935).

21. Id. at 645.

22. Ely, op. cit. supra note 19, at 606.

23. Letter of July 29, 1935, from Commissioner of General Land Office to Register, Denver, Colorado.

24. Patent application is made under 30 USC 29 (1958), and Interior rules, 43 Code Fed. Regs. Part 185 (Rev. 1954).

25. Decision ME C-012327 of Feb. 16, 1962.

26. Gabbs Exploration Company, 67 I.D. 160 (1960).

27. See note 23 supra.

28. The Land Office Manager decision may be appealed to the Director,

Bureau of Land Management, and the Secretary of the Interior.

43 Code Fed. Regs. Part 221 (Cum. Supp. 1962).

29. Gabbs Exploration Company, 67 I.D. 160, 162 (1960) states:

> "In affirming the manager's rejection of the appellant's patent application, the Director's decision pointed out that the charge, in the adverse proceedings brought against these claims in 1930, of failure to perform assessment work could not serve as a basis for declaring the claims null and void . . . The decision held, however, that since the 1930 contest proceedings included the charge that each of the claims had been abandoned, the claims were properly declared null and void in a default judgment of abandonment of these claims."

30. 58 I.D. 550, 553 (1943).

31. Id. at 556.

32. 91 CJS, United States, Sec. 29.

33. See note 26 supra.

34. Executive Order No. 5327 of April 15, 1930, which withdrew all deposits of oil shale and lands containing such deposits owned by the United States from lease or other disposal, was modified by Executive Order No. 6016 of February 6, 1933, so as to authorize oil and gas leases for the withdrawn lands.

35. 63 I.D. 71, 74 (1956); 64 I.D. 103, 105 (1957); Union Oil Company of California v. Udall, 289 F. 2d 790 (D.C. Cir. 1961).

36. Civil No. 16, 803, D.C. Cir.

37. 67 I.D. 160 (1960).

38. 51 L.D. 46 (1925); 51 L.D. 183 (1925).

39. 42 Am. Jur., Public Administrative Law, Sec. 159 states in part:

"Attempts to question, in a subsequent proceeding, the conclusiveness of a prior administrative decision have often been rejected by the courts on the ground that like the judgment of a court, a determination made by an administrative authority in its judicial or quasi-judicial capacity is not subject to collateral attack, at least where the administrative authority has acted within its jurisdiction and the ground of attack asserted relates to mere error or irregularity."

49 C.J.S., Judgments, Sec. 430 states in part:

"A judgment may not be impeached collaterally because of any defects in the pleadings which are amendable, even though such pleadings are bad on general demurrer."

40. 47 L.D. 558, 560 (1920).

41. 67 I.D. 160, 164, 165 (1960).

42. Circular No. 460, Proceedings in Contests on Report by Representatives of the General Land Office, 44 L.D. 572, 573 (1916).

43. Sutherland Statutory Construction Sec. 6605 (3rd ed. 1943).

44. McKay v. McDougall, 64 Pac. 669, 670 (Mont. 1901); Farrell v. Lockhart, 210 U.S. 142 (1908).

45. Farrell v. Lockhart, supra note 44, at 147: " . . . we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator."

46. Cameron v. U.S., 252 U.S. 450, 459, 460 (1920); "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of

these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stat. Secs. 441, 453, 2478 [now codified as 5 USC 485, and 43 USC 2, 1201, respectively] * * * * * Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void . . . " Adams v. Witmer, 271 F. 2d 29, 33 (9th Cir. 1959); "There is no doubt but that the Bureau of Land Management and the Department itself comes within the definition of 'agency' found in the Administrative Procedure Act. Indeed the Department itself has expressly held that a proceeding of this kind is governed by and must be heard in accorance with requirements of the Act [5 USC 1001 et seq. (1958)], United States v. O'Leary, 63 I.D. 341 (1956)." The type proceeding involved in this case was one testing the validity of a mining claim as a basis for patent application.

See 43 Code Fed. Regs. Sec. 221. 67 et seq. (Cum. Supp. 1962) provides in part: "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests

. . .", and Sec. 221.54 relating to private contests requires that there shall be named in the complaint "each party interested."

48. 5 USC 1004(a)(1958).

49. Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, 53 I.D. 228, 231 (1930).

50. 30 USC 40 (1958).

51. See note 49 supra.

52. M-36616 of May 12, 1961.

53. Standard Oil Company of California v. United States, 107 F.2d 402 (9th Cir. 1939).

54. 43 Code Fed. Regs. Part 221 (Cum. Supp. 1962).

55. Id. at Secs. 221.68 and 221.60.

56. 5 USC 1004(a) (1958).

57. 5 USC 1009(e) (1958). With respect to how the Supreme Court views the phrase "unsupported by substantial evidence", see Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) wherein it is stated at 488: ". . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." The Court with candor also commented at 489: "Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words,

new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms."

58. United States v. McCutchen, 238 F. 575, 579 (S.D. Calif. 1916). As to discovery requirements for placer claims, see United States ex rel. U. S. Borax Co. v. Ickes, 98 F. 2d 271, 273 (D.C. Cir. 1938).

59. 30 USC 22 (1958).

60. Castle v. Womble, 19 L.D. 455, 457 (1894).

61. Empire Gas and Fuel Co., 51 L.D. 424, 429 (1926).

62. Johanson v. White, 160 F. 901, 903 (9th Cir. 1908).

63. For a discussion of this trend: Mock, Marketability as a Test of Discovery under the Federal Mining Laws, 7th Annual Rocky Mountain Mineral Law Institute.

64. E.g., United States v. Estate of Hanny, 63 I.D. 369 (1956).

65. United States v. Hammers, 221 U.S. 220 (1911).

66. Rev. Rul. 57-529, 1957-2 Cum. Bull. 325.

67. The conventional method of recovering oil from oil shale involves mining, crushing (to prepare for retorting), retorting (the extraction of oil from oil shale by the application of heat), and refining.

68. Bureau of Mines, Bull. 585, op. cit. supra note 2.

69. 68A stat. 209 (1954).

70. Ibid.

71. E.g., United States v. Cherokee Brick & Tile Co., 218 F. 2d 424 (5th Cir. 1955); United States v. Merry Brothers Brick and Tile Co., 242 F. 2d 708 (5th Cir. 1957); Dragon Cement Co., Inc. v. United States, 244 F. 2d 513 (1st Cir. 1957).

72. For discussion of this matter see 1961 USC Cong. and Admin. News 3016-3020.

73. 364 U.S. 76 (1960).

74. Id. at 86.

75. Id. at 88.

76. 74 Stat. 290 (1960).

77. Ibid.

78. Shepherd et al., Income Tax Aspects of Oil Shale Operations, Prentice-Hall, Oil and Gas Service, para. 2014.4 and 2014.5 (1958).

79. The United States Bureau of Mines defines "oil shale" as a laminated, sedimentary rock containing organic material (usually called "kerogen") from which appreciable amounts of oil can be obtained by the application of heat. Oil shale does not contain oil as such. The oil is formed by the thermal decomposition of the solid organic material derived from pre-existent plant and animal life. See, Stanfield, K.E., et al., Properties of Colorado Oil Shale, Bureau of Mines Report of Investigations 4825 (1951).

80. Oil and Gas Journal, Newsletter, May 15, 1961.

81. Rocky Mountain Oil Reporter, Mar. 1959, tabulates ownership of major Colorado Oil shale properties, and indicates 22 companies hold shale bearing areas of over 1,000 acres. The three largest owners shown are: Standard Oil Company of California (50,600

acres), Union Oil Company of California (40,100 acres), and General Petroleum (23,000 acres).